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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MAINSTREET ORGANIZATION OF REALTORS®, successor by name change to REALTOR® ASSOCIATION OF WEST/SOUTH SUBURBAN CHICAGOLAND,

Petitioner,

v.

CALUMET CITY, ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does due process require a Court of Appeals to give an appellee the opportunity to brief whether it has "prudential standing" prior to deciding that issue adversely to it where (a) the appellant chose not to raise prudential standing on appeal, (b) without prior notice, the Court of Appeals raised the issue *sua sponte* during oral argument, (c) appellee, by motion immediately thereafter, asked the Court of Appeals to allow it to file a supplemental brief, and (d) two prior decisions of the Court of Appeals held that a court could not raise prudential standing *sua sponte*?

2. If an appellant chooses not to raise prudential standing on appeal, after the issue had been considered and decided by the district court, may a Court of Appeals consider prudential standing *sua sponte*?

3. Does an association of real estate brokers, whose members enter into exclusive right to sell contracts with their clients, satisfy the associational standing requirements of *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) and the prudential standing requirements of *Singleton v. Wulff*, 428 U.S. 106 (1976) so that the association may prosecute a case to protect the brokers' home-selling clients' constitutional rights to sell their home?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff and appellee below):

MAINSTREET ORGANIZATION OF REALTORS®, successor by name change to REALTOR® ASSOCIATION OF WEST/SOUTH SUBURBAN CHICAGOLAND

Represented by Philip C. Stahl, Esq., Patrick T. Nash, Esq., Donald P. Bunnin, Esq., and Maggie M. Hanel, Esq., GRIPPO & ELDEN LLC, 111 South Wacker Drive, Chicago, Illinois 60606

Respondent (defendant and appellant below):

CALUMET CITY, ILLINOIS

Represented by Mark H. Sterk, Esq., ODELSON & STERK, LTD., 3318 West 95th Street, Evergreen Park, Illinois 60805

and

John B. Murphey, Esq., ROSENTHAL, MURPHEY & COBLENTZ, 30 North LaSalle Street, Suite 1624, Chicago, Illinois 60602

SUPREME COURT RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner MainStreet Organization of REALTORS® states that there are no parent corporations or publicly-held companies owning 10% or more of its stock.

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CITATIONS FOR OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals (Appendix ("App.") 1-26) is reported at 505 F.3d 742. The order of the District Court granting a preliminary injunction (App. 33-35), the order of the Seventh Circuit denying Petitioner MainStreet Organization of REALTORS®' ("Association") petition for rehearing *en banc* (App. 36-37), and the order of the Seventh Circuit denying Association's motion to file a supplemental brief (App. 31-32) are unreported.

BASIS FOR JURISDICTION IN THIS COURT

The Seventh Circuit's judgment was entered on October 17, 2007. (App. 27-28) The Seventh Circuit denied Association's petition for rehearing *en banc* on November 13, 2007. (App. 36-37) 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Seventh Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Association brought the underlying action pursuant to 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

> other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Association alleges that a Point of Sale Inspection Ordinance adopted by Respondent Calumet City, Illinois ("City") (App. 38-54) is facially unconstitutional because it, among other things, deprives property owners of the right to freely alienate their property without due process of law. In making such arguments, Association invokes the Fifth and Fourteenth Amendments to the United States Constitution which state, in relevant part:

> **Fifth Amendment**: No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> **Fourteenth Amendment**: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

SUMMARY OF ISSUES

On two occasions before oral argument in this case, the Seventh Circuit ruled that a court of appeals may not raise the issue of whether a plaintiff has "prudential standing" *sua sponte*. *See MacLauchlan v. Prudential Ins. Co. of America*, 970 F.2d 357, 359 n.1 (7th Cir. 1992); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 611 (7th Cir. 1999). In this case, City challenged Association's standing in the District Court. The District Court ordered the parties to address standing and decided to allow Association's case to proceed. After extended proceedings, the District Court granted Association's motion for a preliminary injunction. City appealed from the entry of the preliminary injunction, but did not argue that Association lacked prudential standing in its opening appellate brief. As a result of City's concession and in light of the cases cited above, Association did not brief prudential standing. During oral argument, however, the Seventh Circuit raised prudential standing *sua sponte* and then decided the issue against Association without permitting Association to brief the issue (despite repeated requests by Association).

The first issue presented by this petition is whether the conduct of the Seventh Circuit complies with due process. Association submits that the answer to that question is plainly no. As the Court has previously recognized, although a court in some instances may raise issues *sua sponte*, before a court can act on its own initiative, it must accord the parties fair notice and an opportunity to present their positions. *See, e.g., Day v. McDonough*, 547 U.S. 198, 210 (2006).

The second issue presented by this petition is the threshold issue of whether a Court of Appeals should be permitted to raise prudential standing *sua sponte* if an appellant fails to raise, or expressly concedes, it on appeal. There is a split of authority amongst the Circuits on this issue. Prior to this case, the Seventh Circuit held that prudential standing objections, if not appealed, were waived and consideration of prudential standing *sua sponte* was impermissible. The Ninth Circuit similarly held that a failure to raise prudential standing in the district court bars consideration at the appellate level. The Second, Sixth, and D.C. Circuits have taken contrary positions. The disagreement between the Circuits has given rise to confusion and uncertainty that the Court should dispel. The Court should rule that if an appellant fails to raise, or expressly concedes, prudential standing on appeal, a Court of Appeals should not be permitted to revive the issue *sua sponte*.

The third issue presented is whether an association of real estate brokers, whose members enter into

exclusive contracts to sell their clients' property, has associational and prudential standing to prosecute a lawsuit involving the constitutional rights of the brokers' home-selling clients to freely alienate their real property. Association submits that it plainly satisfies the requirements of associational and prudential standing.

PROCEEDINGS IN DISTRICT COURT

Association is an association of real estate brokers and salespersons licensed by the State of Illinois. As noted in its By-laws, Association's objectives include: (1) furthering the interest of home and other real property ownership; (2) safeguarding and advancing the interests of real estate owners, occupants or users, and those engaged in the real estate profession; (3) ensuring strict compliance by federal, state and local governments or their agencies, with the Constitution of the United States and the Illinois State Constitution; and (4) protecting, securing, and vindicating through petition and, if necessary, litigation, the rights of owners, occupants or other users of real estate and real estate professionals, secured by the Constitution of the United States and the Illinois State Constitution. Members' professional activities include the listing and sale of private property. Their seller-clients own properties in City and their buyer-clients seek to own such properties. Members' livelihoods derive from the commissions they earn listing or selling real estate (*e.g.*, if the sale of property does

not close, they earn nothing; if the property sells at a reduced price, they earn less).

By this suit, Association seeks to permanently enjoin enforcement of City's Point of Sale Inspection Ordinance ("Ordinance") (App. 38-54) because it unconstitutionally restrains a property owner's right to sell his property without due process of law. Pursuant to the Ordinance, property can only be sold if City issues transfer stamps. In all but one instance not relevant here, transfer stamps issue only after a seller obtains a final or conditional "Certificate of Compliance" from City and pays any outstanding water bill (even if disputed). A Certificate of Compliance will issue only if City decides that the property "passed" a point of sale inspection. To "pass," a property owner must make all repairs ordered by City even if such repairs are cosmetic in nature (*e.g.*, painting, replacing soap dishes). The Ordinance does not restrict the scope of searches, or the type of repairs that City can force property owners to make as a condition of their right to sell. The Ordinance has no due process safeguards of any kind and no appeal process to challenge City's refusal to issue a Certificate of Compliance or the repair order issued by an inspector.

In addition, the Ordinance permits City to order the "deconversion" of "illegally converted" property. It contains no due process protection, however, against City improperly ordering the deconversion of *legal nonconforming* property. There is no hearing at which property owners are permitted to be represented by

counsel and to submit evidence that the property is "legal." Similarly, property owners cannot appeal a decision by City's inspector that the property is "illegal."

Association filed suit on April 24, 2006 and immediately filed a motion for a preliminary injunction seeking to enjoin enforcement of the Ordinance. At the initial hearing on the motion for preliminary injunction, the District Court raised the issue of whether Association had standing. The parties submitted multiple briefs and attended multiple hearings at which the issue of Association's standing was thoroughly addressed. In its briefs and at the court hearings, City argued that Association lacked associational standing under *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Under *Hunt*, an association may bring suit where: (a) its members would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to Association's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. 432 U.S. at 343. Because Association was, in part, asserting that the Ordinance violated the constitutional rights of City home owners, the first prong of *Hunt* necessarily included the question of whether Association Members had "prudential standing" to assert the rights of third parties under *Singleton v. Wulff*, 428 U.S. 106 (1976). *See, e.g., Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 291 (3d Cir. 2002), *cert. denied*, 537 U.S. 881 (2002) (associational standing can be established

if the association's members have standing to assert a third-party's rights under *Singleton*). Thus, the parties' briefs also addressed standing under *Singleton*.

After thorough consideration of the parties' written submissions and oral arguments, the District Court found that Association had standing. The District Court then considered Association's motion for injunctive relief, determined that such relief was necessary to prevent ongoing violations of the Constitutional rights of City property owners and issued a preliminary injunction that enjoined enforcement of the Ordinance. (App. 33-35)

City appealed. In its opening brief to the Seventh Circuit, City did not raise any prudential standing issues (*i.e.*, the first prong of *Hunt*). In fact, City (at p. 21 of its brief) expressly informed the Court that it was not challenging whether Association satisfied the first two requirements of *Hunt*:

> Since this matter is in the early stages of litigation, this Court must accept all well-pleaded facts as true. As such, this Court must assume that based upon the allegations contained in the complaint, Association meets the first two prongs of the *Hunt* analysis.

Given the District Court's findings and City's concession, Association's Seventh Circuit brief did not address any issues related to the first two prongs of *Hunt* (including prudential standing), save for a brief

footnote in which Association simply stated its agreement with City's concession.

Despite holding in two prior cases that a Court of Appeals cannot raise prudential standing *sua sponte* if a defendant does not raise the issue on appeal, during oral argument on September 7, 2007, the Seventh Circuit did just that and questioned whether Association's Members have prudential standing. Association's counsel answered the Court's questions as well as he could, but because no one contemplated that the issues could be raised at argument, on September 18, 2007, Association filed a motion in the Seventh Circuit seeking leave to file a supplemental brief addressing prudential standing.

On October 17, 2007, without ruling on Association's request to brief the issue, the Seventh Circuit issued its opinion and entered its judgment. (App. 1-28) The Seventh Circuit ruled that the Association did not meet the prudential standing requirements, vacated the injunction issued by the District Court, and dismissed Association's suit. Importantly, the Seventh Circuit found that Association satisfied the standing requirements of Article III. (App. at 2, 5) In making its ruling that Association lacked prudential standing, the Seventh Circuit relied on arguments, assumptions and statements of fact that were not part of the record before it. *See* Section I, below. The day after entering judgment, on October 18, 2007, the Seventh Circuit denied Association's motion for leave to file a supplemental brief, along with three other pending motions (pursuant to which Association had

attempted to inform that Court of developments in the District Court affecting standing). (App. 31-32)

On October 30, 2007, Association filed its Petition for Rehearing *En Banc*, in which it, among other things, again requested the opportunity to brief the issue of prudential standing. The Seventh Circuit denied the Petition. (App. 36-37)

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Violated Association's Due Process Rights By Deciding Prudential Standing Issues Adversely To Association After Raising The Issues *Sua Sponte* And Without Allowing Association An Opportunity To Brief The Issues.

Due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Court has recognized that this basic tenet of due process jurisprudence must be followed when a court raises dispositive issues *sua sponte* and has held that, in such situations, "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Day*, 547 U.S. at 210 (holding that a court can *sua sponte* raise whether a state prisoner's petition for a writ of habeas corpus is timely but "of course" must give the petitioner an opportunity to brief the issue); *Burns v. United States*, 501 U.S. 129, 137-38 (1991) (court

must provide prior notice and an opportunity for the defendant to brief issues if the court *sua sponte* deviates from mandatory sentencing guidelines).

The Court has not yet ruled on whether this rule should be applied where a court *sua sponte* raises the issue of prudential standing. The rationale of the rule requiring a court to allow parties to brief dispositive issues prior to decision, however, is fully applicable to the present situation. In *Day*, the Court cited *Acosta v. Artuz*, 221 F.3d 117, 124-25 (2d Cir. 2000), in support of its conclusion that, "of course," the court must give the litigants the chance to brief dispositive issues raised *sua sponte*. *Acosta*, 221 F.3d at 122, 124, cogently addressed why this must be the rule in our adversarial legal system:

> If the court chooses to raise *sua sponte* the affirmative defense of failure to comply with the [] statute of limitations, however, the court must provide the petitioner with notice and an opportunity to be heard before dismissing on such ground. Here, we apply the well-established principle that "a person is entitled to notice before adverse judicial action is taken against him." [quoting *Lugo v. Keane*, 15 F.3d 29, 30 (2d Cir. 1994)]. * * * Although the courts below had the authority to raise the [] statute of limitations defense on their own motion, the judgments must nevertheless be vacated because the courts dismissed without affording the petitioners notice and an opportunity to be heard. *See Snider v. Melindez*, 199 F.3d 108, 112 (2d Cir.

> 1999) ("The problem with the court's dismissal was not that it was done on the court's own motion, but rather that it was done without affording [petitioner] notice and opportunity to be heard."). The long-standing general rule is that a court may not dismiss an action without providing the adversely affected party with notice and an opportunity to be heard. *See Lugo*, 15 F.3d at 30; *Perez v. Ortiz*, 849 F.2d 793, 797 (2d Cir. 1988); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1365 (2d Cir. 1985) ("'Failure to afford an opportunity to address the court's *sua sponte* motion to dismiss is, by itself, grounds for reversal.'") (quoting *Lewis v. New York*, 547 F.2d 4, 5-6 & n.4 (2d Cir. 1976)).

The rationale for the rule is also explained in *Snider*, 199 F.3d at 113:

> Providing the adversely affected party with notice and an opportunity to be heard plays an important role in establishing the fairness and reliability of the order. It avoids the risk that the court may overlook valid answers to its perception of defects in the plaintiff's case. Furthermore, denying a plaintiff an opportunity to be heard may tend to produce the very effect the court seeks to avoid – a waste of judicial resources – by leading to appeals and remands.

This rationale is entirely on point here and the Court should grant this petition to make it clear that if a court is permitted to raise "prudential standing"

sua sponte (see Section II, below for a discussion as to why a court should *not* be permitted to raise the issue *sua sponte*), the court must give parties the opportunity to brief the issues prior to the court's decision. It is fundamentally unfair and inconsistent with our adversarial legal system that Association's suit was dismissed without Association being given any notice, any opportunity to be heard, or any opportunity to develop a record on an issue that City conceded on appeal. Association submits that the proper role of the court is "to call balls and strikes, and not to pitch or bat." Transcript of Hearings on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, September 12, 2005 at p. 56. Here, the Seventh Circuit refused to accept City's "intentional walk" on prudential standing and called Association "out," without even involving the litigants. *See also Neitzke v. Williams*, 490 U.S. 319, 330 (1989) (limiting courts' authority to *sua sponte* dismiss *in forma pauperis* complaints as frivolous and recognizing that the "adversarial process also crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record").

The Seventh Circuit's decision was not the result of an adversarial process. (Nor was it based on anything in the appellate record). Rather, the Seventh Circuit raised and decided the issues itself, without input from the parties, and advanced justifications for its decision that neither party had argued. For example, the Seventh Circuit decided that Association Members should not be permitted to advance the

rights of their home owner clients because it thought – despite the complete absence of evidence on the point – that home owners, rather than Association Members, were "the potential plaintiffs with the first-hand information about the operation of the ordinance." (App. at 6) In fact, contrary to the Seventh Circuit's contention (which was not based upon anything in the record), Association Members have knowledge far superior to property owners regarding how the Ordinance works and is enforced, including how it unreasonably and unconstitutionally interferes with the right to sell property without due process. While an average person may buy or sell real estate, at most, a few times during his lifetime, Association Members process thousands of sales through City's inspection process each year. Indeed, that is why the vast majority of sellers (more than 80% in Northern Illinois) engage the services of licensed real estate brokers. In each transaction, Association Members are forced to deal with the Ordinance and City's unlawful interference with the sale of private property. Property owners have little, if any, information regarding the Ordinance until they want to sell. Association, through its Members, has information regarding thousands of sales transactions, including how City refuses to permit sales of private property unless owners make cosmetic repairs to their property ordered by City. Brokers also know, better than any individual seller, the adverse effects of City's Ordinance on sales and values. For example, brokers have access to proprietary databases – not accessible to property owners – that contain current and historic

information from which brokers can determine the adverse financial effect of the Ordinance. By making its decision without input from Association, the Seventh Circuit not only denied Association due process, but also based its ruling on an incorrect premise. (In any event, the "facts" underlying all court of appeals' decisions should be based on evidence submitted in, and facts found by, the District Court.)

It cannot be said that Association was provided due process because it was given fifteen minutes during oral argument to address the prudential standing issues raised *sua sponte* by the Seventh Circuit. Because City had conceded the issue and because two prior decisions of the Seventh Circuit (cited above at p. 3) held that a court could not raise prudential standing issues *sua sponte*, there is no conceivable basis to conclude that Association was afforded due process and the opportunity to be heard before its suit was dismissed. *Burns*, 501 U.S. at 136 ("'The right to be heard has little reality or worth unless one is informed' that a decision is contemplated") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Nor was Association given an adequate opportunity to develop the issue further in the District Court, which decided standing issues in favor of Association, before the Seventh Circuit dismissed its suit. If the Seventh Circuit had concerns about prudential standing, it should have identified them and remanded the case to the District Court so that Association (and City) could develop a

more complete factual and legal record, and the District Court could "find" the facts necessary to decide the issue. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (noting that if a district court has concerns about standing, it should "require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing"). If given an opportunity to brief the issue, Association would have argued and shown the Seventh Circuit that remand was the appropriate course of action. Association, of course, was never given that opportunity because the Seventh Circuit denied all of Association's many requests to brief the issue, *after* issuing its opinion and dismissing the suit. (App. 31-32, 36-37)

As detailed below in Section III, the Seventh Circuit's conduct is particularly damaging because, if given an opportunity, Association could present evidence and "valid answers" that unequivocally demonstrate that the Seventh Circuit's "perceptions of defects" regarding Association's standing are erroneous. *Snider*, 199 F.3d at 113. Because the Seventh Circuit's conduct deprived Association of due process, the Court should grant this petition and decide whether a Court of Appeals must at least allow an appellee to file a brief if the court raises prudential standing *sue sponte* – after the issue has been conceded by the appellant.

II. There Are Express Conflicts In The Circuits On Whether A Court Of Appeals May Raise Prudential Standing *Sua Sponte* After An Appellant Waives Or Concedes The Issue On Appeal.

The Court has not yet decided whether a Court of Appeals is permitted to raise prudential standing *sua sponte* if, after addressing the issue in the district court, an appellant chooses not to appeal it. There is a split among the Circuits regarding the issue.[1] Prior to its decision in this matter, the Seventh Circuit had twice held that prudential standing issues, if not appealed, were waived and consideration of prudential standing *sua sponte* was inappropriate. *See MacLauchlan*, 970 F.2d at 359 n.1 (although defendant argued plaintiff lacked standing in the district court, defendant did not challenge standing on appeal and the appellate court "may not raise prudential standing issues *sua sponte*"); *United Transp.*, 183 F.3d at 611 (because the defendant did not raise the issue of prudential standing before the appellate court, it has waived any argument based on that doctrine).

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[1] The Court has given mixed signals as to whether waiver of prudential standing is permissible. *See, e.g., Craig v. Boren*, 429 U.S. 190, 192-94 (1976) (rejecting as untimely contention that prudential considerations militated against third-party standing); *but see, Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986) ("The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinations of the propriety of judicial intervention.").

Also prior to this case, the Seventh Circuit held that a failure to raise prudential standing in the district court bars consideration by an appellate court. *Lindley v. Sullivan*, 889 F.2d 124, 129 (7th Cir. 1989). The Ninth Circuit has reached the same conclusion. *See Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000) (a party waives objections to prudential standing not properly raised before the district court). Conversely, the Second, Sixth, and D.C. Circuits have taken the opposite position. *See, e.g.*, *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) (appellate court has an independent obligation to examine standing under arguments not raised in the district court, including when the parties fail to raise the issue on appeal); *Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994) (rejecting argument that individual parties may waive prudential standing requirements if they fail to raise standing as an issue on appeal after losing on the standing issue raised in the district court); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994) (appellate court bound to conduct an independent inquiry on appeal of constitutional and prudential standing even though standing was not challenged in, or ruled on by, the district court).

Under what circumstances, if any, a Court of Appeals may consider prudential standing *sua sponte* is a recurring issue on which at least five circuits have now taken sides. Further, as evidenced by the

confusion in this case, it is apparent that there is an urgent need for the Court to address the issue to resolve the conflict. The issue is ripe for consideration by this Court.

Upon consideration of the issue, the Court should conclude that, if a district court has considered prudential standing and an appellant does not raise the issue on appeal, the Court of Appeals may not consider the issue *sua sponte*. The justification for such a rule is plain. Prudential standing considerations require fact-intensive analyses that are best conducted by the district courts based upon evidence presented by the parties. *Warth*, 422 U.S. at 501. District courts are best able to handle such inquiries and, to the extent prudential standing considerations are not raised by the parties, could be raised by the district courts *sua sponte*, again with the benefit of an evidentiary record created through the adversarial process. *Id.* As the gate keepers to the federal court system, district courts are fully able, and the best equipped, to ensure that Article III and prudential standing requirements are met and third party rights are adequately protected. If, after such inquiry and decision in the district court, an appellant chooses not to raise the issue on appeal, there is no reason to permit the Court of Appeals to do so.

Unlike Article III limitations on standing, which courts are obliged to address because it is a predicate to their subject matter jurisdiction (*Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986)), the doctrine of prudential standing is a

judge-made "rule of practice" that is not "ordained by the Constitution." *United States v. Raines*, 362 U.S. 17, 22 (1960) (quoting *Barrows v. Jackson*, 346 U.S. 249, 257 (1953)). As such, "exceptions to [prudential standing] where there are weighty countervailing policies have been and are recognized." *Id.* There is no good reason why express waiver by an appellant – after an unfavorable decision by the district court – ought not be one of these exceptions.

The Court has historically disfavored courts raising non-jurisdictional defenses *sua sponte* where a party chooses not to raise them because such conduct is inconsistent with our adversarial legal system. *See Arizona v. California*, 530 U.S. 392, 412-13 (2000) ("[C]ourts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication."); *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

The Court should apply such well-established reasoning here and hold that a Court of Appeals cannot raise prudential standing *sua sponte* if an appellant does not raise it on appeal after the district court has decided the issue. Unlike Article III standing, "the prudential doctrine of standing has come to encompass 'several judicially self-imposed limits on

the exercise of federal jurisdiction.'" *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Given that the constitutional mandates of Article III are not applicable to the "judicially self-imposed rules of practice," the reasoning supporting the impermissibility of waiver or concession of Article III standing does not apply to a determination of whether prudential standing may be waived or conceded. For example, where, as here, it is undisputed that a party such as Association has Article III standing, there may be instances where an appellant would prefer to appeal important issues in one case with an association representing the interests of third-parties rather than litigating the same issues in multiple lawsuits before different judges brought by an ad hoc collection of plaintiffs (here, individual property owners). Appealing important issues in one case against a well-represented association will almost certainly be more efficient than litigating issues on an ad hoc basis. There is no good reason why a court should not permit an appellant to choose not to raise prudential standing on appeal after losing standing issues before the district court. Indeed, allowing a Court of Appeals to raise the issue *sua sponte* after waiver by an appellant presents an opportunity for judicial activism (albeit, to foreclose access to federal court). That is inconsistent with our judicial system.

Accordingly, this Court should grant this petition and hold that, where an appellant fails to raise or

concedes prudential standing on appeal, after raising the issue in the district court, a Court of Appeals may not consider prudential standing *sua sponte*.

III. The Seventh Circuit's Decision Conflicts With This Court's Decisions In *Hunt* and *Singleton*; Association Has Met The Requirements Of Associational And Prudential Standing.

The Court has not yet decided whether an association of real estate brokers has standing to litigate issues involving the constitutional rights of the brokers' home owner clients. If the Court concludes that the Seventh Circuit acted properly by raising and deciding prudential standing *sua sponte* without giving Association the opportunity to brief the issue and/or without remanding to the District Court, the Court should nonetheless grant this petition to correct the Seventh Circuit's decision that Association does not have associational and prudential standing to litigate issues involving the constitutional rights of their home owner clients. The Seventh Circuit's decision is plainly inconsistent with *Hunt* and *Singleton*. The Court should grant this petition to prevent the Seventh Circuit's opinion from being used as precedent to erode principles of associational and third-party standing that the Court has established and repeatedly upheld over the last 30 years. Needless to say, abandoning well-established precedent should be done only in limited circumstances by the Court – and never by a Court of Appeals.

Under *Hunt*, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343. It is plain that Association satisfies the second and third prongs of *Hunt*. As shown by its By-laws (quoted at p. 5, above), the interests of City home owners that Association seeks to protect – namely the right to freely alienate property without unconstitutional governmental interference – are germane, indeed central, to Association's purpose. In addition, Association seeks only injunctive relief. As such, participation of its Members is unnecessary. (Again, the District Court proceeded without an Association Member plaintiff and entered a preliminary injunction. The District Court plainly was in a superior position to determine whether Member participation is "required" to adjudicate the constitutional claims.)

The first prong of the *Hunt* analysis, which City conceded on appeal, can be satisfied by meeting the requirements of the test set forth in *Singleton*. *See, e.g., Pennsylvania Psychiatric Soc'y*, 280 F.3d at 291 (associational standing can be established if the association's members have standing to assert a third-party's rights under *Singleton*).

Under *Singleton*, (1) Association's brokers must allege "'injury in fact' . . . to [establish] Art. III

jurisdiction"; and (2) the court must determine whether, "as a prudential matter," Association's brokers are "proper proponents of the particular legal rights on which [Association's brokers] base their suit." 428 U.S. at 112. As found by both the District Court and the Seventh Circuit, Association satisfied the standing requirements of Article III. (App. at 2, 5) As detailed *infra*, it is plain that Association also satisfies *Singleton*'s mandates regarding prudential standing.

Under *Singleton*, the general rule that "one may not claim standing in this Court to vindicate the constitutional rights of some third-party" should not be applied where "two factual elements" exist to show that the "underlying justifications [for the general rule] are absent." 428 U.S. at 114. Those factual elements are:

> [T]he relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the rights is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and third-party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter. *Id.* at 114-15.
>
> [and]

> [T]he ability of the third-party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third-party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent. *Id.* at 115-16.

As detailed below, the prudential elements weigh in favor of Association.

A. Closeness of Relationship.

In order for Association to satisfy the "close relationship" test, the relationship must permit Association to operate "fully, or very nearly, as effective a proponent" of the property owners' rights as the property owners themselves. *Pennsylvania Psychiatric Soc'y*, 280 F.3d at 289. That test is met here. Association's objectives include furthering the interests of home ownership, safeguarding the interests of brokers and home owners, and protecting the rights guaranteed to property owners by the United States Constitution. Association Members enter into "exclusive right to sell" agreements with owners, must be licensed by the State to sell the property of another, 225 Ill. Comp. Stat. 454/5-15 (2008), and are statutorily required to follow City's Ordinance, 225 Ill. Comp. Stat. 454/15-15(a)(5) (2008) (licensed brokers

are bound to follow all statutes and regulations governing the sale of real property). Their interests are thus identical by agreement and by statute. As concerns the sale of homes, Association Members' and property owners' interests are identical – both want to sell the property as promptly as possible, for the highest price, without unconstitutional obstruction by City of the right to transfer the property. The Ordinance adversely affects the brokers and their clients in exactly the same way because it prevents the sale of private property which, of course, is the sole purpose of the relationship between the broker and home owner. Accordingly, Association is "uniquely qualified" to protect property owners' rights. *Singleton*, 428 U.S. at 117. Contrary to the Seventh Circuit's erroneous decision, the interests of Association Members are in no way "remote" from the interests of home sellers. Indeed, pursuant to the exclusive right to sell agreements, brokers – unlike the termite inspectors and title insurance companies cited by the Seventh Circuit as having similarly "remote" interests in the sale of a house – become the home owner's proxy and the *exclusive* means to sell property – again, by agreement and by statute.

Next, there will be either no or "little loss in terms of effective advocacy" from permitting Association to pursue its claim against City rather than individual property owners. *Singleton*, 428 U.S. at 118. In fact, as explained above, contrary to the Seventh Circuit's contention (which was not based upon any evidence contained in the record before the

Seventh Circuit), Association Members have knowledge superior to property owners, especially with respect to how the Ordinance works to prevent sales. With such superior knowledge, there will be no loss in terms of effective advocacy by allowing Association to litigate these issues.

Moreover, the Association's "institutional" interest in advancing property rights – and the thousands of transactions its Members process in City annually – will motivate it to vigorously pursue the constitutional claims. A property owner, who may sell only once in City, certainly benefits from the institutional advocacy of his broker's trade association.

The close relationship between property sellers and their real estate brokers is akin to the relationships between doctors and patients (*Singleton*), lawyer and client (*Caplin & Drysdale v. United States*, 491 U.S. 617 (1989)), and beer vendor and consumer (*Craig v. Boren*, 429 U.S. 190, 192-94 (1976)) which this Court has previously held satisfy the *Singleton* test. In those situations, as is the case here, the third-party hires and relies on the litigant to perform a specific task for which the litigant is specifically trained and licensed in compliance with the law (*i.e.*, perform abortions, provide legal counsel, sell beer or sell real estate). Here, the owner wants to sell his property and, by written contract, Association's Member has the *exclusive right* to sell it. Accordingly, "the enjoyment of the right [of the property owner] is inextricably bound up with the activity the litigant wishes to pursue." *Singleton*, 428 U.S. at 114.

Under these cases, then, the Court should hold that the "close relationship" prong of *Singleton* is satisfied.

B. Existence of Obstacles.

Under *Singleton*, "some genuine obstacle" to a third-party asserting his rights must exist. 428 U.S. at 115-16. Such obstacles need not be "insurmountable." *Id.* at 117. There must only be some hindrance to the third party's ability to protect his or her own interests. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Examples include the prohibitive cost of pursuing litigation (*Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 363 F. Supp. 2d 47, 53 (D.P.R. 2005), *aff'd*, 443 F.3d 103 (1st Cir. 2006) (holding that an association had standing to represent third-party rights when the third-parties' "inability to finance the litigation" prevented the third-parties from asserting their claim)), and the "imminent mootness" of a third-party's rights (*Singleton*, 428 U.S. at 117).

Here, individual sellers do not have the financial means or incentive to sue City. Generally, City property owners are not affluent and do not have the financial resources, or may not perceive there is a sufficient financial incentive, to mount a constitutional challenge in the federal court system. Also, a seller's claim could become moot when the sale closed. Sellers' primary goals are to sell their property promptly (in many cases because their purchase of a new home cannot close until the sale of their current home is completed) and for the highest price. Given

the fluid (and currently depressed) real estate market, delaying the sale to mount a constitutional challenge is not an effective or affordable option. The delay of litigation alone could also cause the loss of a particular buyer, who was likely selected based upon individual financial qualifications. Further, the cost of complying with City's repair order or paying a disputed water bill is less than the cost of preparing and filing a complaint or a single day of trial. Given these obstacles, the assertion of rights by the individual sellers would be, in practical terms, near impossible.

Despite the foregoing, the Seventh Circuit concluded that it "need not worry" about any such obstacles because "all the home owners in Calumet City can be joined in a class action." (App. at 8) However, the same could have been said of the patients in *Singleton*, the clients in *Caplin & Drysdale*, and the beer drinkers in *Craig*. Moreover, the Court has recognized the advantages of an association bringing suit instead of a class action:

> While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. "Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack." . . . "[The] interest and expertise of this plaintiff, when exerted on behalf

> of its directly affected members, assure 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'"

International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Brock, 477 U.S. 274, 289 (1986).[2]

The Court's rationale is on point here. Association has superior knowledge, financial and research resources, and expertise. Individual home owners, on the other hand, cannot or do not want to be constitutional heroes challenging City's Ordinance.

The Seventh Circuit's decision represents a dangerous and unwarranted restriction on associational and prudential standing doctrines the Court has followed for more than 30 years. Its effect will be less advocacy of constitutionally-protected property rights and more infringement of those rights. The Court should grant this petition and reverse the Seventh Circuit's decision.

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[2] Neither City nor Association suggested to the Seventh Circuit that a class action was a proper way to proceed. The Seventh Circuit raised this idea on its own, without input from the parties. Again, if given the opportunity to brief the issue, Association would have cited *Brock* and explained what the Court recognized there – namely that associational litigation is often preferred to class action litigation.

CONCLUSION

Association respectfully urges this Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit to address whether (1) a court of appeals is permitted to consider prudential standing *sua sponte* if an appellant does not raise the issue on appeal, (2) if it is, whether it must provide the appellee an opportunity to brief the issue (including whether the case should be remanded to the district court for development of a more complete record and fact-finding) before it decides it, and/or (3) whether the Seventh Circuit's opinion is an improper abandonment of the Court's associational and prudential standing precedent.

Dated: February 11, 2008

Respectfully submitted,

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In the

United States Court of Appeals

for the Seventh Circuit

No. 06-4377

MAINSTREET ORGANIZATION OF REALTORS,
successor by name change to REALTOR
ASSOCIATION OF WEST/SOUTH SUBURBAN CHICAGOLAND,

Plaintiff-Appellee,

v.

CALUMET CITY, ILLINOIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 06 C 2271 – **Milton I. Shadur, *Judge***.

ARGUED SEPTEMBER 7, 2007 – DECIDED OCTOBER 17, 2007

Before BAUER, POSNER, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. The plaintiff in this civil rights lawsuit is an association of real estate brokers in a portion of the Chicago metropolitan area that includes Calumet City. The City enacted an ordinance that forbids the sale of a house without an inspection to determine whether it is in compliance with the City's building and zoning codes. If it is not, the house

must be brought into compliance with the code. Such "point of sale" ordinances are common. They aim to prevent the surreptitious conversion of single-family homes to multi-family dwellings and to retard the physical deterioration of the housing stock. *Delman v. City of Cleveland Heights,* 534 N.E.2d 835, 836-37 (Ohio 1989); *Butcher v. City of Detroit,* 401 N.W.2d 260, 262 (Mich. App. 1986) (per curiam); *Currier v. City of Pasadena,* 121 Cal. Rptr. 913, 914-15 (App. 1975); *see also Dome Realty, Inc. v. City of Paterson,* 416 A.2d 334, 337-38 (N.J. 1980). The association currently claims that the ordinance deprives homeowners of property without due process of law; other claims have fallen by the wayside. The suit seeks to enjoin the enforcement of the ordinance. The association sought and obtained a preliminary injunction from the district court and the City has appealed.

We do not reach the merits of the suit or express an opinion on them. Real estate brokers, in our judgment, do not have standing to challenge a law that impedes the sale of property they would like to broker; and their association's standing is derivative from theirs and falls with it. *National Solid Waste Management Ass'n v. Pine Belt Regional Solid Waste Management,* 389 F.3d 491, 497-99 (5th Cir. 2004).

A complication is that there are two different issues of standing. There is Article III standing, which requires just an injury in fact, and "prudential" standing, a more complex, judge-made concept of standing. We think there is standing in the first sense but not the second. There is standing in the first

sense because the brokers may well be harmed by the ordinance. By adding to the cost of selling residential property, the ordinance (if allowed to go into effect) is likely to reduce the brokers' commissions in two ways. The higher the cost of selling property, the less property will be sold, and so the fewer commissions the brokers will be paid. And anything that reduces the salability of property reduces its market value, and the lower the price at which a house is sold the smaller the commission the broker will receive. Of course a seller might try to charge a higher price in order to cover some of the cost of complying with the ordinance, and a broker's commission is normally a percentage of the sale price. But the seller's attempt would fail if indeed the ordinance reduces the value of the property to prospective purchasers.

Against this it can be argued that the ordinance will boost property values in Calumet City and by doing so perhaps make the brokers better off rather than worse off. That is possible, but standing in the Article III sense does not require a certainty or even a very high probability that the plaintiff is complaining about a real injury, suffered or threatened. A suit to redress an injury to the plaintiff is a "case" or "controversy" within the meaning that the courts have imprinted on these words of Article III of the Constitution, *Allen v. Wright,* 468 U.S. 737, 750-51 (1984), as long as there is some nonnegligible, nontheoretical, probability of harm that the plaintiff's suit if successful would redress. As we have noted repeatedly, the fact that a loss or other harm on which a suit is based

is probabilistic rather than certain does not defeat standing. *E.g., Korczak v. Sedeman,* 427 F.3d 419, 422-23 (7th Cir. 2005); *North Shore Gas Co. v. EPA,* 930 F.2d 1239, 1242 (7th Cir. 1991). Thus, as we said in *Hoover v. Wagner,* 47 F.3d 845, 847 (7th Cir. 1995), in reliance on the Supreme Court's decision in *Pennell v. City of San José,* 485 U.S. 1, 8 (1988), "All that a plaintiff need show to establish standing to sue [in the Article III sense] is a reasonable probability – not a certainty – of suffering tangible harm unless he obtains the relief that he is seeking in the suit." A case is not dismissed for failure to invoke federal jurisdiction just because the plaintiff fails to prove injury. Ordinarily and here the allegation is enough.

It is true that if the federal courts could decide cases brought by persons on whom a defendant's alleged misconduct could not possibly inflict tangible harm, so that a person living in California who read about Calumet City's point of sale ordinance could have brought the present suit, the power of the federal courts relative to the other branches of government would be magnified alarmingly. In *Aurora Loan Services, Inc. v. Craddieth,* 442 F.3d 1018, 1024 (7th Cir. 2006), we gave the following example of the kind of case that Article III standing therefore excludes from the federal courts: "[T]here is a sense in which I am 'injured' when I become upset by reading about the damage caused that fine old vineyard in Burgundy by a band of marauding teetotalers, yet that injury would not be an 'injury' that conferred standing to sue under Article III." That is not this

case. This is not a case of some abstract psychic harm or a one-day-I'll-be-hurt allegation, as in *Lujan v. Defenders of Wildlife, Inc.*, 504 U.S. 555, 560 (1992). The challenged ordinance is quite likely to delay the sale of homes in the area serviced by the real estate brokers whose association has brought this suit, to reduce sales prices, and thus to reduce the brokers' commissions, and this likelihood of a tangible economic loss to them suffices to confer Article III standing.

But there is also a nonconstitutional doctrine, entirely judge-made, of standing, to which the unilluminating term "prudential standing" has been affixed. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982); *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Grand Council of Crees v. Federal Energy Regulatory Commission*, 198 F.3d 950, 954 (D.C. Cir. 2000); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir. 2007). This doctrine precludes the federal courts from exercising jurisdiction over some types of case that Article III would not forbid the courts to adjudicate. It is this doctrine that bars the present suit from being adjudicated in a federal court.

The doctrine is various. The strand relevant to this case governs the situation in which the injury on which the plaintiff founds his suit is derivative from the injury suffered by the defendant's immediate victim. Often the harm from a harmful act will ramify far beyond that victim, as the present case illustrates.

The initial victims of an ordinance impeding the sale of homes are homeowners who would like to sell – or perhaps all homeowners subject to the ordinance; for as we said, any impairment of the salability of a property reduces its value because salability ("alienability" in an older legal vocabulary) is one of the rights that, along with such other rights as the right to the exclusive enjoyment of the property, make a fee-simple interest more valuable than other interests in property, such as that of a licensee. But anything that impedes the sale of property, and by impeding it reduces the number of sales and the average sale price, harms other people besides the owners. It harms real estate brokers, sure, but it also harms title insurance companies, mortgage lenders, termite inspectors, moving companies, interior decorators, renovators, prospective home buyers, sellers of "for sale" signs, suppliers of paint for the "for sale" signs, lessors of real estate brokers' offices, colleges that the children of real estate brokers can no longer afford to attend because the brokers' incomes have declined (and the children themselves, of course), and so on ad infinitum, or at least ad nauseam. If all these incidental victims could sue, the courts would be overwhelmed. Moreover, the victims with the largest stakes – namely the homeowners impeded in selling their homes – who are also the potential plaintiffs with the first-hand information about the operation of the ordinance, are likely to be trampled in the rush to the courthouse. It is not only in bankruptcy that "clouds of persons indirectly affected by the acts and entitlements of others may buzz about, delaying final

resolution of cases." *In re Deist Forest Products, Inc.*, 850 F.2d 340, 341 (7th Cir. 1988).

The brokers' suit thus is barred by the principle that, subject to certain exceptions, one cannot sue in a federal court to enforce someone else's legal rights. *Id.*; *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 17-18 (2004); *Warth v. Seldin*, 422 U.S. 490, 508-10 (1975); *Massey v. Helman*, 196 F.3d 727, 740-42 (7th Cir. 1999). The brokers are not suing to enforce their constitutional property rights; they have no rights in commissions they may someday earn on sales of property with whose owners they have as yet no brokerage contract. They are suing to enforce the property rights of the owners of residential property. A member of the plaintiff association who had a brokerage contract with a homeowner harmed by the ordinance might be able to argue that the contract gave him (the broker) a property right of which he was being deprived. But that is not the claim; the claim is that the broker can litigate the alleged deprivation of the homeowner's property right. No doubt some members of the association own homes in Calumet City, since they work there. But the association that is the plaintiff in this case is suing on behalf of its members' interests as brokers, not as homeowners.

We mentioned exceptions. *Craig v. Boren*, 429 U.S. 190, 193-94 (1976), is illustrative. A liquor dealer who wanted to sell beer to males under the age of 21 because females could buy it at age 18 claimed that the difference in eligibility was a denial of equal

protection. He thus was trying to litigate a constitutional claim belonging to someone else. But the statute he was challenging was aimed at liquor dealers and so he had as definite a stake in the vindication of the claim as a doctor forbidden by law to perform an abortion has in vindicating his patients' right to undergo the procedure. *See Kowalski v. Tesmer,* 543 U.S. 125, 130 (2004); *U.S. Dept. of Labor v. Triplett,* 494 U.S. 715, 720 (1990); *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 954-58 (1984); *Singleton v. Wulff,* 428 U.S. 106, 113-18 (1976) (plurality opinion). He was an immediate rather than a remote victim. In contrast, Calumet City's ordinance imposes no duties or sanctions on real estate brokers.

We need not worry that unless the doctrine limiting third-party standing is bent in this case there will be nobody to obtain a ruling on the constitutionality of the Calumet City ordinance. Compare *Lepelletier v. FDIC,* 164 F.3d 37, 43 (D.C. Cir. 1999). Even if the harm to the individual homeowner who encounters delay and expense in selling his house because of the ordinance is too slight to motivate him to bear the expense of bringing a lawsuit, all the homeowners in Calumet City can be joined in a class action, since all will have suffered a possible diminution in the value of their property as a result of the ordinance. As there is no hindrance to the primary victims' enforcing their rights, there is no reason to allow the brokers into the litigation arena. *See Kowalski v. Tesmer, supra,* 543 U.S. at 131.

Hindrance would be the effect of allowing this suit to go forward.

It would be more perspicuous to describe the doctrine that bars the brokers at the threshold as that of *remoteness,* and illustrate it with reference to the rule of antitrust law that denies the right of a purchaser from a cartel's customers to sue the cartel for damages even if the customer passed on the cartel overcharge to their purchasers. *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). There is Article III standing, but there is no right to sue – not because there is no antitrust violation, but because it is efficient to confine the right to suit to the immediate customer of the cartel rather than to multiply the number of plaintiffs and burden the court with having to apportion damages between the first and second tiers of purchasers.

Notice that while the practical objections to allowing the second-tier purchaser to sue are identical to the objections to allowing someone harmed by the infringement of another's rights to sue, the antitrust case doesn't fit squarely into the "no-third-party-standing" pigeonhole. The second-tier purchaser is not complaining about the cartel's violation of the first-tier purchasers' rights; he is claiming that he too has a right under antitrust law not to be victimized (even if indirectly) by a cartel. If we don't want him to be allowed to sue we can *say* he has no right under antitrust law and thus turn it into a third-party case. But it is cleaner to say that the injury is too remote; that the first-tier purchaser has

better information about the presence of cartel pricing and should therefore have the right to sue, as there will be better enforcement that way. Similarly, the brokers' injury in this case is too remote to sustain standing even if they might be thought to have a property right, perhaps in contracts that they have signed with homeowners who want to sell but because of the ordinance are less likely to be able to do so at an attractive price. The cases differ because the brokers are not seeking damages, and therefore the issue of apportionment presented by the antitrust case does not arise. But the problem of allowing a derivative victim to preempt the claims of the immediate victim is the same in both cases.

The only wrinkle in this case is that the City did not argue remoteness until we raised the issue at oral argument. And because the remoteness doctrine is not jurisdictional in the sense that Article III standing is – if there is no Article III standing, the court is obliged to dismiss the suit even if the standing issue has not been raised – it may seem that it can be waived or forfeited just like any other nonjurisdictional defense to a suit.

But nonconstitutional lack of standing belongs to an intermediate class of cases in which a court can notice an error and reverse on the basis of it even though no party has noticed it and the error is not jurisdictional, at least in the conventional sense. Another example is the failure of a petitioner for federal habeas corpus to have exhausted his state

remedies. Even when exhaustion is not a jurisdictional prerequisite to judicial review, the court can in its discretion dismiss for failure to exhaust. *Granberry v. Greer,* 481 U.S. 129, 130-33 (1987); *see also Champagne v. Schlesinger,* 506 F.2d 979, 982 (7th Cir. 1974) (failure to exhaust administrative remedies); *Taylor v. United States Treasury Dept.,* 127 F.3d 470, 477 (5th Cir. 1997). Abstention in favor of another court or an agency is still another example of a doctrine that a court can invoke on its own initiative in a case that is within its jurisdiction. *Bellotti v. Baird,* 428 U.S. 132, 143 n. 10 (1976); *International College of Surgeons v. City of Chicago,* 153 F.3d 356, 360-61 (7th Cir. 1998); *San Remo Hotel v. City & County of San Francisco,* 145 F.3d 1095, 1105 (9th Cir. 1998).

Those are not cases about remoteness; what connects them to our case is the presence of interests that are not represented by the parties, whether the interests of missing parties (such as homeowners, in this case) or the independent interests of the court. When judicial or administrative remedies have not been exhausted, the court is at risk of making an ill-informed ruling because it lacks the benefit of another tribunal's expertise; or an unnecessary ruling because the agency might have resolved the case and the loser not have sought judicial review; or a ruling that gratuitously affronts another judicial system. As we said in *Waldron v. McAtee,* 723 F.2d 1348, 1351 (7th Cir. 1983), "when a court abstains in order to avoid unnecessary constitutional adjudication ('*Pullman*' abstention, after *Railroad Comm'n v. Pullman*

Co., 312 U.S. 496 (1941)), it is not seeking to protect the rights of one of the parties; it is seeking to promote a harmonious federal system by avoiding a collision between the federal courts and state (including local) legislatures."

In a typical case of remoteness, such as the cartel case that we mentioned, the cartel's members may not care which tier of purchasers sues them. Neither may Calumet City care whether it is sued by real estate brokers or homeowners. Indeed, in both cases the defendants might prefer the derivative victim to sue, because his stake may be smaller than the immediate victim's stake, or, being at a further remove from the alleged misconduct than the immediate victim, he may be a less informed and therefore less effective plaintiff. The immediate victim is harmed the most and knows the most, but is not before the court to assert his interest in controlling litigation against the wrongdoer.

Because what we are calling the doctrine of remoteness is a method of judicial protection of absent parties or other unrepresented interests, a court can invoke it on its own initiative, as many cases make clear. *See, e.g., Delorme v. United States,* 354 F.3d 810, 815 (8th Cir. 2004); *American Immigration Lawyers Ass'n v. Reno,* 199 F.3d 1352, 1357-58 (D.C. Cir. 2000); *Community First Bank v. National Credit Union Administration,* 41 F.3d 1050, 1053 (D.C.. Cir. 1994); *Thompson v. County of Franklin,* 15 F.3d 245, 247-49 (2d Cir. 1994). It is true, as pointed out in a careful discussion in *UPS Worldwide*

Forwarding, Inc. v. United States Postal Service, 66 F.3d 621, 626 n. 6 (3d Cir. 1995), that the issue has not been definitively resolved by the Supreme Court. But the Court signaled its answer in *Warth v. Seldin, supra.* It explained that the bar against third-party standing is "founded in concern about the proper – and properly limited – role of the courts in a democratic society," that it sets "limits on the class of persons who may invoke the courts' decisional and remedial powers," and that both Article III standing and prudential standing "are threshold determinants of the propriety of judicial intervention." 422 U.S. at 498-99, 518. Note also the statement in *Allen v. Wright, supra,* that *both* sorts of standing place "limits on the exercise of federal *jurisdiction*." 468 U.S. at 751 (emphasis added).

A sentence in *Lindley v. Sullivan,* 889 F.2d 124, 129 (7th Cir. 1989), could be read to say that a party's failure to object to third-party standing bars judicial consideration of it. But that would not be a correct reading. For what we meant was simply that such a failure is a ground for refusing to consider the doctrine. This must be the correct interpretation because the sentence is not elaborated and the only authority cited for it is the Supreme Court's opinion in *Craig v. Boren, supra,* 429 U.S. at 193-94, which holds that failure to invoke the doctrine is a ground for refusing to invoke it, not that it bars invocation. And the court in *Lindley* went on to hold that the requirements of nonconstitutional standing had been satisfied. That would have been inconsistent with its saying that it

had no power to address the issue unless it were raised by a party.

Lindley has twice been cited by this court for the proposition that a court is barred from raising a prudential-standing issue on its own initiative. *MacLauchlan v. Prudential Ins. Co. of America,* 970 F.2d 357, 359 n. 1 (7th Cir. 1992); *United Transportation Board v. Surface Transportation Board,* 183 F.3d 606, 610-11 (7th Cir. 1999). In *United Transportation,* as in *Lindley*, the opinion goes on to discuss whether the requirements of nonconstitutional standing are satisfied and concludes that they are. The opinion says, moreover, only that the standing issue was "waived," which is not quite the same as saying that the court could not reach it – which in fact it did. *MacLauchlan* does state flatly, albeit in a footnote, that "we may not raise prudential standing issues *sua sponte*." But in the curious circumstances of that case we think the statement should be regarded as dictum rather than holding. The plaintiff was the widow of a man who had applied for a life insurance policy and died before the application was approved. The widow argued that the insurance company (the defendant) was legally obligated to issue the policy and that therefore she was entitled to a judgment for the proceeds. Apparently she had not been named in the application as a beneficiary, so there was a question of her right to sue. The district court rejected the suit on the merits without bothering to determine her right to sue, and the insurance company, which had raised the issue in the district court, abandoned it in

our court, which agreed with the district court that the suit had no merit. There would have been no point to our raising the issue of prudential standing; it would simply have delayed the resolution of an obviously meritless appeal.

Because the real estate brokers and their association do not have standing to challenge the Calumet City point of sale ordinance, the preliminary injunction issued by the district court is vacated and the suit is dismissed without prejudice.

SYKES, *Circuit Judge*, concurring. I agree with my colleagues that the preliminary injunction must be vacated and the case dismissed for lack of standing. The court's analysis of prudential standing doctrine is comprehensive, and I join the panel's conclusion that the plaintiff's alleged injury is too remote to permit it to litigate this constitutional claim. I disagree, however, that the plaintiff has gotten over the first hurdle of establishing constitutional standing; Article III's case-or-controversy requirements are not met here.

The MainStreet Organization of Realtors ("the Association") brought this action seeking declaratory and injunctive relief to "redress the deprivation . . . of rights guaranteed to the Realtor Association, its Members, and the citizens of [Calumet City] by the Fourth, Fifth and Fourteenth Amendments." These deprivations, according to the complaint, were caused by the City's point-of-sale code compliance ordinance.

The Fourth Amendment claim alleged that the ordinance impermissibly subjects the City's property owners to warrantless inspections; the Fifth Amendment claim alleged unconstitutional takings of property without just compensation; and the Fourteenth Amendment claims alleged that the ordinance violates equal protection and deprives the owners of their property without due process of law. Only the due process claim remains.

The district court granted the Association's motion for a preliminary injunction prohibiting the City from enforcing the ordinance. The City responded by amending the ordinance. The district court then dissolved the first injunction as moot but was dissatisfied with the City's efforts and entered a second injunction prohibiting enforcement of the amended ordinance. The amended ordinance, like its predecessor, requires that real property in the City be inspected for compliance with the City's building and zoning codes before it is sold. Generally speaking, ownership may not be transferred until the property complies with building and zoning codes or adequate provision is made to bring the property up to code. As the court notes, point-of-sale ordinances like this one are common building and zoning code enforcement measures and are aimed at maintaining the quality of municipal housing stocks.

As to associational standing (*see Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)), the Association alleged that the City's point-of-sale ordinance "adversely affect[ed]" its member-brokers'

"ability to consummate real estate transactions." The bulk of the Association's complaint, however, is devoted to the effect of the ordinance on the rights of the City's property owners, *not* the Association's members. The same is true of the Association's motion for a preliminary injunction. The district court gave the question of the Association's standing short shrift, summarily concluding that "the interest that . . . [the Association's members] are entitled to protect is essentially their business interest. It's a deprivation of the ability to earn commission[s] on sales."

The court appears to reject this holding – rightly, I think – for the rather obvious reason that the Association's members "have no rights in commissions they may someday earn on sales of property with whose owners they have as yet no brokerage contract." Majority op., at 6. But the court also concludes that the possibility of reduced future commissions – commissions the brokers have no arguable legal right or expectation to receive – is enough to confer constitutional standing. I cannot see how this can be reconciled.

It is clear, as the court notes, that "Calumet City's ordinance imposes no duties or sanctions on real estate brokers." Majority op. at 7. The very nature of the claims initially asserted – warrantless property inspections, unconstitutional takings of property, deprivations of property in violation of equal protection and due process – demonstrates that the rights the ordinance is alleged to infringe belong to the property owners, *not* the real estate brokers. As

such, the court concludes (and I agree) that "[t]he brokers are not suing to enforce their constitutional property rights[,] . . . [t]hey are suing to enforce the property rights of the owners of residential property." Majority op. at 6. But this means the Association has failed to establish Article III standing, not just that prudential standing considerations preclude this suit, as the court concludes. An injury to the City's real property owners does not confer standing on the City's real estate brokers simply because they are collaterally affected. Without some cognizable injury to *their own rights,* the brokers (and derivatively, the Association) lack constitutional standing to sue, and judicial policy governing third-party standing does not come into play.[1]

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[1] Prudential standing considerations generally prohibit "a litigant's raising another person's legal rights," *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 11-12 (2004), but this doctrine kicks in to bar suit (or not) only *after* the litigant has established his own Article III standing to sue. In *Newdow,* for example, the plaintiff established constitutional standing to challenge the practice of daily recitation of the Pledge of Allegiance in his daughter's school as an unconstitutional interference with his right as a parent to direct the religious education of his daughter. *Id.* at 9-10. The Supreme Court concluded that although Article III requirements were met, prudential considerations required dismissal of the father's suit because a state court had awarded legal custody to the child's mother, depriving the father of his right under state law to sue to vindicate his daughter's rights as her "next friend." *Id.* at 17-18. The Court held: "In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the

(Continued on following page)

"The 'core component' of the requirement that a litigant have standing to invoke the authority of a federal court 'is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006) (quoting *Lujan v. Defenders of Wildlife, Inc.*, 504 U.S. 555, 560 (1992)). The "threshold question in every federal case" is "whether the plaintiff has 'alleged such a *personal* stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (emphasis added) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). This is because "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Id.* at 499.

The familiar requirements of Article III standing are: "First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and internal quotations omitted). "Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able]

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lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." *Id.* at 17.

to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* (internal quotations omitted). And "[t]hird, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotations omitted). Thus, a federal court's jurisdiction "can be invoked *only* when the plaintiff *himself* has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *Warth,* 422 U.S. at 499 (emphasis added) (quoting *Linda R.S. v. Richard D.,* 410 U.S. 614, 617 (1973)).

The Supreme Court has made it clear that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan,* 504 U.S. at 562 (quoting *Allen v. Wright,* 468 U.S. 737, 758 (1984)). Where the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*[,] . . . causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps the response of others as well." *Id.*; *see also DH2, Inc. v. U.S. S.E.C.,* 422 F.3d 591, 596 (7th Cir. 2005). "In this situation, 'much more is needed' to establish standing. . . ." *DH2, Inc.,* 422 F.3d at 596 (quoting *Lujan,* 504 U.S. at 562).

Finally, "[t]he party invoking federal jurisdiction bears the burden of establishing the[ ] elements" of

standing. *Lujan,* 504 U.S. at 561; *see also Daimler-Chrysler,* 126 S. Ct. at 1861 n.3. These are "not mere pleading requirements but rather an indispensable part of the plaintiff's case," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan,* 504 U.S. at 561. At the pleading stage, the plaintiff must allege facts that, assuming their truth, would establish the injury-in-fact elements necessary to support standing. At summary judgment, those facts must be supported in the usual way (by affidavit or other evidence), and at trial they must be proven. *Id.*

In light of these well-established principles, it is hard to understand the court's categorical statement that a "case is not dismissed for failure to invoke federal jurisdiction just because the plaintiff fails to prove injury." Majority op. at 3-4. To the contrary, it is the plaintiff's burden to prove injury-in-fact, *Lujan,* 504 U.S. at 561-62, and cases are often dismissed for failure of the plaintiff to carry that burden. *See, e.g., DaimlerChrysler,* 126 S. Ct. at 1868; *Lujan,* 504 U.S. at 562; *Winkler v. Gates,* 481 F.3d 977, 988 (7th Cir. 2007); *DH2, Inc.,* 422 F.3d at 596-97. Also, I cannot agree with the court's view that "[o]rdinarily and here the allegation [of injury] is enough," as long as "there is some nonnegligable, nontheoretical, probability of harm." Majority op. at 3-4. This treats the constitutional minimums as trifling requirements easily satisfied by almost any allegation of injury, leaving

only prudential standing considerations to be consulted. But the Supreme Court has long emphasized that the case-or-controversy requirement is critical to the legitimacy of the court's role: "That requirement states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called 'prudential' considerations." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) ("[N]either the counsels of prudence nor the policies implicit in the 'case or controversy' requirement should be mistaken for the rigorous Art. III requirements themselves.").

I do not mean to suggest that "to establish standing a plaintiff must establish that a right of his has been infringed; that would conflate the issue of standing with the merits of the suit." *Aurora Loan Servs., Inc. v. Craddieth,* 442 F.3d 1018, 1024 (7th Cir. 2006). Rather, the plaintiff "must have a colorable *claim* to such a right." *Id.* Thus, "[a]lthough standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, . . . it often turns on the nature and source of the claim asserted." *Warth,* 422 U.S. at 500. Accordingly, "[i]t is not enough that he claims to have been injured by the defendant's conduct. 'The alleged injury must be legally and judicially cognizable.'" *Craddieth,* 442 F.3d at 1024 (quoting *Raines v. Byrd,* 521 U.S. 811, 819 (1997)). That is, "the injury must be to the sort of interest that the law protects when it is *wrongfully* invaded." *Id.*

This case advanced beyond the pleading stage to the entry of a preliminary injunction, which of course requires the plaintiff to shoulder the burden of establishing a likelihood of success on the merits. *Christian Legal Soc'y v. Walker,* 453 F.3d 803, 859 (7th Cir. 2006). This includes the elements of standing and usually requires the plaintiff to move beyond mere allegations. But the Association's motion for a preliminary injunction did no more than rely on the complaint, almost all of which, as I have noted, pertains to the rights of the City's property owners. As to its members' interests, the Association alleged only that the point-of-sale ordinance adversely affected its members' ability to consummate real estate transactions. This is not a legally protected interest; the brokers do not have a generalized right to consummate real estate transactions or earn commissions.

It is certainly true as a practical economic matter that real estate brokers have an interest in consummating as many transactions as they can at the highest prices possible so as to maximize the amount of commissions they earn. But this is nothing more than an aspiration, not an expectation or right; no law, state or federal, protects this interest. That the point-of-sale ordinance has the potential to reduce commissions does not alone establish injury for purposes of constitutional standing; the Association must establish that the brokers' interest in future commissions is "the sort of interest that the law protects when it is *wrongfully* invaded." *Craddieth,*

442 F.3d at 1024. It has not done so. The brokers do not have a colorable due process claim to future commissions; the Association does not argue otherwise. Indeed, the Association has invoked *no* principle of law – constitutional, statutory, or common law – as an arguable source of legal protection for its members' interests. The injury asserted here, while perhaps a plausible practical one, is not "legally and judicially cognizable." *Raines,* 521 U.S. at 819. Without a claim of injury to a legally protected interest, the brokers cannot establish Article III standing.

Moreover, because the point-of-sale ordinance regulates real property owners, not brokers, the claim asserted here arises from the City's allegedly unconstitutional regulation of someone *other than* the Association's members, and "much more is needed" to establish standing. *Lujan,* 504 U.S. at 562. The attenuated injury asserted by the Association is insufficient to satisfy this standard. The brokers' alleged injury (even assuming it is legally cognizable and judicially redressable) depends upon the independent action of third parties not before the court – namely, the property owners upon whom the ordinance operates, building inspectors and zoning authorities, and prospective buyers of real property in the City who are just as likely to pay more, not less, for property that complies with the City's codes. This is too conjectural to satisfy the "much more" that is needed to establish standing where the challenged regulation burdens someone other than the plaintiff.

In short, the brokers' alleged injury is "a diffuse and speculative harm," and more fundamentally, the "interest asserted is not a legally protected one." *DH2, Inc.*, 422 F.3d at 596-97. The suit therefore must be dismissed for lack of Article III standing. Of course, my disagreement with my colleagues on this point means only that the case is doubly dismissible; I join the court's conclusion that prudential third-party standing doctrine bars the Association from bringing this claim. But if the Supreme Court's recent standing jurisprudence means anything, it is that constitutional standing prerequisites are to be closely monitored and scrupulously enforced. *See Hein v. Freedom Religion Found.*, 127 S. Ct. 2553, 2562 (2007) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.") (quotation omitted); *DaimlerChrysler*, 126 S. Ct. at 1861 ("The case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (internal quotations omitted). This is (or should be) true even when there is a prudential doctrine handy to guard against unwarranted extensions of judicial authority. I see little reason to think the Court would be inclined to relax the constitutional minimums in third-party standing cases.

The "federal courts sit 'solely[ ] to decide on the rights of individuals,'" *Hein*, 127 S. Ct. at 2562 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170

(1803)), "and must 'refrai[n] from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.'" *Id.* (quoting *Valley Forge*, 454 U.S. at 474). The brokers' rights are not at issue here; their Association therefore is not entitled to litigate the question of the constitutionality of the City's point-of-sale ordinance. I join the court in vacating the preliminary injunction and dismissing the suit, but for lack of constitutional, as well as prudential, standing.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: October 17, 2007

BEFORE: Honorable WILLIAM J. BAUER,
Circuit Judge

Honorable RICHARD A. POSNER,
Circuit Judge

Honorable DIANE S. SYKES,
Circuit Judge

No. 06-4377

MAINSTREET ORGANIZATION OF REALTORS, successor by name change to REALTOR ASSOCIATION OF WEST/SOUTH SUBURBAN CHICAGOLAND,

Plaintiff-Appellee

v.

CALUMET CITY, ILLINOIS,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 06 C 2271, Milton I. Shadur, Judge

The preliminary injunction issued by the district court is VACATED and the suit is dismissed without prejudice. The above is in accordance with the decision

of this court entered on this date. Costs are awarded in favor of the defendant-appellant.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

DATE: November 21, 2007

TO: Michael W. Dobbins
United States District Court
Northern District of Illinois
219 S. Dearborn Street
Chicago, IL 60604

FROM: Clerk of the Court

RE: 06-4377
Mainstreet Realtors v. Calumet City IL
06 C 2271, Milton I. Shadur, Judge

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

[ ] No record filed
[x] Original record on appeal consisting of:

ENCLOSED:	**TO BE RETURNED AT LATER DATE:**
[ ] Volumes of pleadings	[2]
[ ] Volumes of loose pleadings	[ ]
[ ] Volumes of transcripts	[6]
[ ] Volumes of exhibits	[ ]
[ ] Volumes of depositions	[ ]
[ ] In Camera material	[ ]
[ ] Other _____	[ ]
_____	

Record being retained for use in Appeal No. _____ [ ]

Copies of this notice sent to: Counsel of record
[ ] United States Marshal
[ ] United States Probation Office

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date: _____ /s/ _____
Deputy Clerk, U.S. District Court

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 18, 2007

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

MAINSTREET ORGANIZATION OF REALTORS, successor by name change to REALTOR ASSOCIATION OF WEST/SOUTH SUBURBAN CHICAGOLAND, Plaintiff-Appellee,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 06-4377 v.	No. 06 C 2271
CALUMET CITY, ILLINOIS, Defendant-Appellant.	Milton I. Shadur, Judge.

The following are before the court:

1. **MOTION OF APPELLEE MAINSTREET ORGANIZATION OF REALTORS FOR LEAVE TO INFORM THE COURT OF MATERIAL DEVELOPMENTS IN THE DISTRICT COURT AND TO FILE SUPPLEMENTAL BRIEF**, filed on September 18, 2007, by counsel.

2. **MOTION FOR SUPERVISORY ORDER DIRECTING THE DISTRICT COURT TO STAY**

FURTHER PROCEEDINGS, filed on September 20, 2007, by counsel for the appellant.

3. **SUPPLEMENTAL MOTION FOR SUPERVISORY ORDER**, filed on September 26, 2007, by counsel for appellant.

4. **RESPONSE OF MAINSTREET ORGANIZATION OF REALTORS TO CALUMET CITY'S MOTION TO STAY FURTHER PROCEEDINGS IN THE DISTRICT COURT**, filed on September 26, 2007, by counsel.

5. **MOTION OF MAINSTREET ORGANIZATION OF REALTORS FOR LEAVE TO INFORM THE COURT OF MATERIAL DEVELOPMENTS IN THE DISTRICT COURT**, Filed on October 12, 2007, by counsel.

In light of the opinion, issued on October 17, 2007, vacating the preliminary injunction and dismissing the suit, **IT IS ORDERED** that #1, #2, #3, #4 and #5 are **DENIED**.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

REALTORS® ASSOCIATION OF WEST/SOUTH SUBURBAN CHICAGOLAND, *Plaintiff,*	Case No. 06 C 2271
v.	Judge Milton I. Shadur
CALUMET CITY, ILLINOIS, *Defendant.*	

ORDER GRANTING PRELIMINARY INJUNCTION

This matter has come on to be heard on the motion of plaintiff ("Association") for a preliminary injunction, with due notice having been given and this Court being fully advised in the premises. For the reasons set forth on the record at the hearing of this matter on August 2, 2006 and at other hearings, and based on the written submissions of the parties, this Court finds that as to Association's claims that the Deconversion Provisions and the Amended Point of Sale Inspection Ordinance (as defined below) are facially unconstitutional:

1. Association has established associational standing.

2. Association has established a high likelihood of success on the merits.

3. There is no adequate remedy at law, and Association and its Members will suffer irreparable harm if injunctive relief is not granted.

4. Such irreparable harm that Association and its Members will suffer if injunctive relief is wrongfully denied substantially outweighs any irreparable harm that defendant Calumet City ("City") will suffer in injunctive relief is wrongfully granted.

5. Granting injunctive relief will not disserve the public interest – indeed, will serve the public interest – in terms of the consequences to non-parties.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. City and its agents, employees, officers, successors and members (collectively included within "City," though treated for convenience as a singular noun in this Order), is prohibited and enjoined from enforcing (a) Section 14-1 of Chapter 14, Article I of the Calumet City Code, as amended by Ordinance No. 06-68 (the "Amended Point of Sale Inspection Ordinance"), including but not limited to any provisions of the Amended Point of Sale Inspection Ordinance that require sellers of legal nonconforming property to "deconvert" them into structures with fewer income-producing rental units (the "Deconversion Provisions"), and (b) Section 327(b) of Chapter 82, Article X of the Calumet City Code ("Section 327(b)"). This Order shall not prohibit City from attempting to

collect unpaid water bills by lawful means other than pursuant to Section 327(b).

2. City is prohibited and enjoined from (a) conducting inspections pursuant to the Amended Point of Sale Inspection Ordinance; (b) prohibiting the sale of property and refusing to issue transfer stamps in the absence of a point of sale inspection and/or issuance of a "certificate of compliance" or "conditional certificate of compliance;" and (c) ordering the deconversion of legal nonconforming property. City shall allow the sale or transfer of property without requiring point of sale inspections or deconversions of legal nonconforming property.

3. This order shall remain in effect until the trial on the merits, unless modified by this Court.

4. Because no costs or damages will be incurred or suffered by City if the requested injunction is issued, this Court deems it proper that, pursuant to Fed. R. Civ. P. 65(c), no security need be given by Association.

5. This Court's August 8, 2006 Order Granting Preliminary Injunction as to an earlier version of the now-Amended Point of Sale Ordinance is now moot, and the injunction granted thereby is dissolved.

Date: December 8, 2006 /s/ Milton J. Shadur
Judge Milton I. Shadur

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 13, 2007

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Diane S. Sykes, *Circuit Judge*

No. 06-4377

MAINSTREET ORGANIZATION OF REALTORS, successor by name change to REALTOR ASSOCIATION OF WEST/SOUTH SUBURBAN CHICAGOLAND,
Plaintiff-Appellee,

v.

CALUMET CITY, ILLINOIS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 2271

Milton I. Shadur, *Judge*.

ORDER

On October 30, 2007 plaintiff-appellee filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has

requested a vote on the petition for rehearing *en banc*.* The petition is therefore DENIED.

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* The Hon. Kenneth F. Ripple did not take part in the consideration or decision of this case.

THE CITY OF CALUMET CITY
COOK COUNTY, ILLINOIS

ORDINANCE
NUMBER 06-68

AN ORDINANCE AMENDING
CHAPTERS 14 AND 82 OF THE
MUNICIPAL CODE OF CALUMET CITY
REGARDING POINT OF SALE INSPECTIONS
AND REAL ESTATE TRANSTER TAX

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ORDINANCE NO. 06-68

AN ORDINANCE AMENDING CHAPTERS 14 and 82 OF THE MUNICIPAL CODE OF CALUMET CITY REGARDING POINT OF SALE INSPECTIONS AND REAL ESTATE TRANSFER TAX

WHEREAS, the City of Calumet City has reviewed the provisions of its Municipal Code governing Point of Sale Inspections; and

WHEREAS, it is the intention of the City of Calumet City to continue to provide for periodic inspections of dwellings upon the transfer of interest or ownership thereof; and

WHEREAS, the City of Calumet City believes it is in the best interests of the health, safety and welfare to make the following amendments to its Ordinance regarding Point of Sale Inspections.

NOW, THEREFORE, be it ordained by the Mayor and City Council of the City of Calumet City, Cook County, Illinois, in the exercise of Calumet City's home rule powers as follows:

Section 1: Chapter 14, Article I, Section 14-1 of the Municipal Code of the City of Calumet City is hereby amended by deleting the text thereof and substituting the following text in its place:

Sec. 14-1. *Point of Sale Inspection Requirement; Certificate of Compliance Procedures*

(a) *Department Created; Definition; General Requirement.*

1. A Department of Inspectional Services is hereby created pursuant to this section. The Department of Inspectional Services ("Department") shall be headed by a Director of Inspectional Services ("Director," which shall also include the Director's designees) who shall be appointed by the Mayor with the advice and consent of the City Council. All inspectional services concerning point of sale matters within the City, including building and housing, shall be under the jurisdiction of the Department. The building commissioner, electrical inspector, plumbing inspector, housing director and all Department inspectors and staff shall be responsible for reporting to the Director relative to all matters relating to this section and the Director shall have full authority to direct, train and provide appropriate personnel subject to City Council approval as to expenditures and/or requirements as provided herein.

2. For the purpose of this section, the term "Point of Sale Inspection" means an inspection of real property by the Department conducted in connection with a taxable transfer of real estate to determine whether the condition of said property conforms to the specific regulations identified in this Section.

3. A Point of Sale Inspection shall be required relative to any transfer of any interest in property

which is subject to this Section, except as exempted herein.

(b) ***Notice of Transfer of Real Property Required.*** Whenever an owner of real property in the City proposes to engage in a transfer of real property in the City which is subject to taxation under Chapter 82, Article X of the Calumet City Municipal Code (Real Estate Transfer Tax), such owner shall provide the Department a Notice of Transfer for said property, on a form therefore provided by the Department.

(c) Compliance ***Inspection; Pertinent Code Requirements.*** The Notice of Transfer form shall also constitute the Director's request to inspect such property ("Compliance Inspection") to determine whether such property is in compliance with the following specific requirements, which the corporate authorities of the City find are related to the public health, safety and welfare:

(1) ***Compliance with Specific City Codes.*** All structures shall be in compliance with City building ordinances, including any property maintenance codes adopted by the City, which codes are set forth elsewhere in this Chapter 14.

(2) ***Inspection to Determine Possibly Illegal Conversions.*** All structures shall be inspected to determine whether they have been illegally converted. For purposes of this subsection, "illegally converted" means that the property was converted to another or additional use beyond that for which the

property was originally permitted, and which [i] is in violation of the property's zoning limitations and [ii] is not a legal nonconforming use under Section V of the City Zoning Ordinance.

(d) ***Proposed Compliance Inspection.*** When the owner files the Notice of Transfer, the Department will schedule a proposed Compliance Inspection to be conducted within 28 calendar days of the Notice. The Notice of Transfer Form shall includes the following:

(1) Date and time of the proposed Compliance Inspection;

(2) A statement that the owner or occupant has the right to withhold consent to the Compliance Inspection and require the City to obtain a warrant to conduct the inspection;

(3) For occupied rental dwellings, the City must also request and obtain the consent of the tenant prior to conducting any inspection; and

(4) A space for the owner and/or to indicate that the owner and/or tenant either consent to the Compliance Inspection, or refuse consent.

(e) ***Refusal to Consent; Warrant Procedures.*** If the owner or occupant does not consent to the proposed inspection, the Director may appear before any judge in the Circuit Court of Cook County and seek an administrative search warrant to allow an inspection. Any such application shall be made within 10 calendar days after the owner's nonconsent. The

application for the warrant shall specify the basis upon which the warrant is being sought and shall include a statement that the inspection will be limited to a determination whether there are violations of the Code provisions identified in this Section, and whether there have been any illegal conversions. The Court may consider any of the following factors along with such other matters as it deems pertinent in its decision as to whether a warrant shall issue:

(1) eyewitness account of violation;

(2) citizen complaints;

(3) tenant complaints;

(4) plain view violations;

(5) violations apparent from City records;

(6) property deterioration

(7) age of property

(8) nature of alleged violation;

(9) condition of similar properties in the area;

(10) documented violations on similar properties in the area;

(11) passage of time since last inspection;

(12) previous violations on the property.

(f) ***Uninspected Property; Transfer Stamps.*** In the event the owner or occupant refuses to consent to an inspection, and the Director does not seek a warrant (or if Court refuses an application for the warrant), the Department shall notify the City Clerk that "Uninspected Property" transfer stamps may issue.

In connection with the issuance of transfer stamps, the City Clerk shall advise the purchaser of such property that it is "Uninspected Property."

(g) ***Inspection Procedures.*** In the event consent is given or a warrant issues, the Department shall conduct the Compliance Inspection as provided in subsection (c) and (d). Within 3 business days after the Compliance Inspection the Department shall issue a written notice of violations and repairs, if any, necessary to bring the property into compliance with this Section. In the event the inspection reveals a structure which has been illegally converted, the Department shall issue a Notice of Deconversion, specifying the measures which must be taken in order to bring the illegally converted structure into compliance with applicable zoning regulations.

(h) ***Follow-Up Repairs; Reinspection.*** A party issued a notice of repairs as provided for in subsection (g) shall proceed to make such repairs. Upon completion of said repairs and notice thereof to the Department, the Department will conduct a reinspection within 3 business days thereafter. Upon completion of the follow-up repairs, and the completion of any deconversion measures required by the Department, the Department shall issue a Certificate of Compliance.

(i) ***Payment of Current Water Bills; Predeprivation Hearing.*** The seller must pay the current water bill (as defined in Section 82-327(b) of the Municipal Code) and other fees owed by the seller to Calumet

City prior to the issuance of transfer stamps. In the event the owner disputes any such obligation (or any portion thereof), the Office of City Clerk shall promptly provide the owner with a predeprivation due process hearing consistent with the principles enunciated in *Memphis Light, Gas & Water Division v Craft*, 436 U.S. 1 (1978). The City Clerk's office shall provide the hearing with 3 business days of a request. If the owner disputes the City's determination as to liability, the owner may pay said bill under protest, and may pursue any remedies available to said seller to recover the claimed overcharge.

(j) ***Conditional Certificate of Compliance; Procedures.*** An owner who has not completed the repairs identified through the inspection may nevertheless transfer ownership of property if:

(1) The owner or agent has deposited with the City an amount of money determined by the Director or his designee to be sufficient to bring the structure into compliance with all City building and zoning ordinances and any applicable housing, fire or property maintenance codes or regulations; and

(2) The buyer, conveyee, transferee, assignee or successor in title, ownership or interest (Hereinafter "buyer") has entered into an agreement with the City whereby the buyer agrees to bring the structure into compliance within the time period determined by the Director or his designee, to bring the structure into compliance with all applicable Code requirements within a period not

to exceed one hundred eighty (180) calendar days after the closing of the transaction ("closing").

(3) If the buyer enters into such an agreement, a Conditional Certificate of Compliance will issue in order to allow the closing to be completed. The Conditional Certificate of Compliance shall be issued by the Department and shall terminate on the one hundred eighty-first day after closing and no extensions shall be granted. A buyer who elects to accept the premises, subject to the inspection with existing violations, and who agrees, in order to close, to be responsible as provided herein, shall execute a sworn affidavit satisfactory to the Director, which will clearly indicate that the buyer is fully aware of the existing violations as well as the possibility of violations that may have existed but were undiscovered due to lack of access and agrees to accept the requirement and obligation to bring the structure into compliance within one hundred eighty (180) days of the closing. The City shall issue a Certificate of Compliance upon completion of the repairs necessary to bring the dwelling or structure into compliance.

(4) In the event the buyer fails to complete the required repairs, and have the repairs verified on reinspection, the Director is hereby authorized to pursue enforcement proceedings through the Calumet City administrative adjudication process, or, at his discretion, through the Circuit Court of

Cook County. The buyer hereby agrees to submit to the jurisdiction and venue of the Calumet City Administrative Adjudication Process and the Circuit Court of Cook County and to waive service of summons subject only to the notice requirement as required by law in order to enable the City to expeditiously obtain an order of compliance with this section.

(5) If reasonable proof that the repairs have been completed is not received by the Director or his designee within the required period for the repairs to be completed, the City, may also issue a citation for violation of this Chapter and/or the escrow repair agreement, and may also pursue any applicable administrative or judicial remedies to bring the structure and property into compliance with applicable codes and regulations.

(6) The fine for violations of this Chapter shall be not less than one hundred dollar's ($100) nor more than one thousand dollars ($1,000.00) per day for each day the violations remain uncorrected.

(k) ***Licensed and Bonded Contractors.*** All contractors performing repairs identified in the point of sale inspection, or issuing certifications shall be licensed by the City and bonded and shall make available, upon request, copies of their license(s), verification of their liability insurance, errors and omissions insurance policies, and surety bond.

(l) ***Validity of Certificate of Compliance.*** A Certificate of Compliance issued to the seller shall be valid for one hundred eighty (180) days from the date of issuance.

(m) ***No Warranty.*** In issuing a certificate of compliance or a conditional certificate of compliance, the City and its agents do not make any warranty, representation or statement nor does it intend to insure or guarantee to either buyer or seller of the property subject to the point of sale inspection or any of their designees, agents, representatives, heirs or assigns or any other interested party, including mortgage companies, insurance companies, banks or any other party which may have any interest relative to the property subject to the point-of-sale inspection, nor does the City affirm that there are no additional unnoted violations relative to any other provisions of any of the Municipal Code of the City of Calumet City, or relevant statutes, ordinances, rules and regulations of the County of Cook, the State of Illinois or the United States of America.

(o) ***Inspection Fee Schedule.***

(1) The fee for a point of sale inspection shall be one hundred-fifty dollars ($150.00) for all single-family residential inspections. The failure of an owner/seller or his designee to appear at the time of inspection shall result in a fifty-dollar ($50.00) penalty.

(2) The fee for a point of sale inspection shall be one hundred-fifty dollars ($150.00) plus

twenty-five additional dollars ($25.00) for each residential unit in excess of one unit.

(3) A fee of twenty cents ($0.20) per square foot shall be charged for each commercial/industrial unit inspected with a minimum fee of two hundred dollars ($200.00) per commercial/industrial unit.

(4) Each fee set for the above covers the cost of one (1) follow-up inspection to verify compliance. In the event that additional inspections are required because full compliance did not exist at the time of the reinspection, then an additional reinspection fee of fifty dollars ($50.00) per unit shall be assessed.

(5) If an owner, agent or tenant has failed to appear for two previously scheduled inspections, an additional inspection fee of fifty dollars ($50.00) per unit shall be assessed.

Section 2: Section 82-327(b) of the Calumet City Municipal Code is hereby amended to provide as follows:

(b) The City Clerk shall issue no stamps for the transfer of any dwelling, structure, commercial or industrial building unless the grantor/seller (i) presents a "Certificate of Compliance" or other certificate indicating compliance with appropriate city ordinances and/or codes signed by an authorized signatory of the department of inspectional services or (ii) presents an "Uninspected Property" notice to the City Clerk pursuant to Section 14-1(f) of the City Code. The City

Clerk shall provide the purchaser notice whether the property is inspected or uninspected.

Additionally, prior to the issuance of transfer tax stamps, and subject to the procedures as set forth in Section 14-1(i) of the City Code, the grantor/seller shall present to the city clerk proof of a current paid water bill. The term "current" shall be defined as the most recent bill issued to the grantor/seller and certified as same by an authorized official of the water department of the city. The water department shall not issue certification of a paid water bill relative to any transfer of title unless the new owner's name and address is supplied to an official of the water department simultaneously upon request for certification of a paid water bill. Grantors/sellers who are exempt from the requirement of purchase of transfer stamps shall be required to comply with the requirements of this section, and shall have the Section 141(1) procedural rights.

Section 3: If any section, paragraph, clause or provision of this ordinance shall be held invalid, the invalidity thereof shall not effect any of the other provisions of this ordinance.

Section 4: All ordinances in conflict herewith are hereby repealed to the extent of such conflict.

Section 5: This ordinance shall be in full force and effect from and after its passage, approval and publication as provided by law.

ADOPTED this 24th day of August, 2006, pursuant to a roll call vote as follows:

	YES	NO	ABSENT	PRESENT
Gonzalez	X			
Jones	X			
Pallick	X			
Manousopoulos	X			
Tarka	X			
Wilson	X			
Wosczynski	X			
Qualkinbush (Mayor)				
TOTAL	7			

APPROVED by the Mayor on August 24, 2006.

/s/ Michelle Markiewicz Qualkinbush
Michelle Markiewicz Qualkinbush
MAYOR

ATTEST:

/s/ Gloria L. Dooley
Gloria Dooley
CITY CLERK

Ord. #06-68

EXECUTIVE SUMMARY OF POINT OF SALE ORDINANCE AMENDMENTS

The City of Calumet City has extensively modified various provisions of the City Code relating to the transfer of real estate and the Point of Sale inspection requirements. The amendments are designed to clearly delineate rights and responsibilities of property owners in connection with the sale of property and issuance of transfer stamps. The ordinance balances individual rights against the imperative that the City maintain the quality of its housing stock.

Here is a summary of revised Section 14-1. The Point of Sale requirements apply only in those cases where property transfers are subject to the City's transfer tax. See Sec. 82-321, *et seq.* of the City Code.

Subsection (a). This Section maintains the definition of the Department of Inspectional Services. Sec. 2 defines the term "Point of Sale Inspection," by identifying the specific code requirements which must be satisfied in connection with the sale of property. Subsection 3 sets forth the general requirement that a point of sale inspection is generally required.

Subsection (b) requires an owner of real estate to notify the City of his or her intent to transfer real estate.

Subsection (c) obligates the Department to request an inspection of the property proposed for transfer. The inspection is specifically designed to

insure that the property conforms to the specifically identified code requirements, and to prevent the perpetuation of illegally converted properties.

Subsection (d) provides that once the Department receives the Notice of Transfer, the department will schedule a proposed inspection. The owner will be notified that he or she has the right to withhold consent to the inspection and require the City to obtain a warrant should the City desire to inspect. Tenants are also obligated to give consent to inspection of their units.

Subsection (e) addresses the processes to be followed if the owner declines consent. The City will make a determination as to whether or not to seek an administrative search warrant. In the event the City decides not to seek a warrant, of if a request for warrant is declined, Subsection (f) requires the City to proceed to the issuance of transfer stamps.

Subsection (g) addresses the procedures to be followed by the City when the owner consents to the inspection. Under Subsection (d), the inspection will be conducted within 28 days. The City will promptly notify a property owner as to items which need to be corrected. Under Subsection (h), the City will do a prompt reinspection once the owner notifies as to the repairs which have been made.

Subsection (i) requires that the property's current water bill be paid prior to the issuance of transfer stamps. The ordinance now specifically grants the owner an opportunity to have an informal due process

hearing in the event the owner contests the water bill.

Subsection (j) continues to provide for conditional certificates of compliance.

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(2)

Supreme Court, U.S.
FILED
APR 30 2008
OFFICE OF THE CLERK

No. 07-1047

IN THE

Supreme Court of the United States

MAINSTREET ORGANIZATION OF REALTORS, SUCCESSOR BY NAME CHANGE TO REALTOR ASSOCIATION OF WEST/SOUTH SUBURBAN CHICAGOLAND,

Petitioner,

v.

CALUMET CITY, ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the Seventh Circuit's Opinion finding that Petitioner did not possess standing to challenge the constitutionality of Respondent's Point-of-Sale Inspection Ordinance and reversing the District Court's granting of a preliminary injunction enjoining enforcement of the Point-of-Sale Ordinance was correct and does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim or establish that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition where the Seventh Circuit's *sua sponte* consideration of Petitioner's standing, including prudential standing, to bring this action challenging the constitutionality of Respondent's Point-of-Sale Ordinance was correct and does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim or establish that the Seventh Circuit's *sua sponte* consideration of standing, including prudential standing, implicates an important federal question that has not been settled by this Court.

III. Whether Petitioner has presented compelling reasons to grant the Petition where the Seventh Circuit's denial of Petitioner's request to submit supplemental briefs on the issue of its standing,

including prudential standing, after the Seventh Circuit properly raised the issue *sua sponte*, was correct and does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim or establish that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

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OBJECTIONS TO JURISDICTION IN THIS COURT

On October 17, 2007, the Seventh Circuit determined that Petitioner ("the Association") did not have prudential standing to bring this challenge to the constitutionality of Respondent's ("City's") Point-of-Sale Inspection Ordinance. The Seventh Circuit reversed the District Court, vacating the preliminary injunction against enforcement of the ordinance and dismissing the suit without prejudice. Accordingly, Petitioner lacks standing to pursue the writ of *certiorari*, and this Court lacks jurisdiction. Additionally, as noted in the concurring opinion of Justice Sykes in the Seventh Circuit, Petitioner has not met its burden of demonstrating that it has Article III standing in this matter. Pet. App. 15-26. There is no jurisdictional basis for this Court to consider or grant the Petition.

COUNTER STATEMENT OF THE CASE

Petitioner is an association of Chicago-area real estate brokers which brought suit in the Unites States District Court for the Northern District of Illinois challenging the constitutionality of a Point-of-Sale Inspection Ordinance ("ordinance"), adopted by Calumet City, Illinois. The ordinance specifically requires that upon the sale of a house within the City, the seller/owner must obtain an inspection of the house to determine whether it is in compliance with the City's building and zoning codes. The City's issuance of a real estate transfer stamp is conditioned on the house being in compliance with the relevant codes, among other conditions. If the house is not in compliance, the house

must be brought into compliance with the code. One of the primary objectives of the ordinance is to prevent the surreptitious conversion of single-family houses to multi-family dwellings and to mitigate the physical deterioration of the housing stock within the City. As recognized by the Seventh Circuit's opinion in this case, such municipal ordinances are common.

The Association filed its complaint on April 24, 2006, seeking declaratory and injunctive relief against enforcement of the ordinance against City homeowners, among other remedies. In response to the Association's lawsuit, the City moved to dismiss its claims on several grounds. Among the arguments raised by the City was an objection to the Association's standing in the District Court to challenge the ordinance on behalf of homeowners who were not members of the Association.

While the matter was proceeding before the District Court, the City amended the ordinance. Pet. App., 38-51. The amendments, however, did not result in an end of the litigation, and as a result of motion practice before the District Court, the Association's remaining claim alleged that the ordinance deprived the homeowners of their property without due process of law. The District Court found that the Association did have standing to sue the City, and the court granted the Association's request for a preliminary injunction and enjoined the City's enforcement of the ordinance. Pet. App., 33-35. The City appealed the granting of the injunction to the Seventh Circuit Court of Appeals.

At oral argument on September 7, 2007, a three-judge panel of the Seventh Circuit Court of Appeals questioned both counsel, whether the Association had prudential standing to bring a suit to enjoin enforcement of an ordinance directly affecting City homeowners. The following colloquy took place during oral argument between the Association's counsel and the court:

> "MR. STAHL [Association's counsel]: But I'd like to address the standing point because I think we can straighten this out.
>
> * * *
>
> MR. STAHL: This was all completely and fully addressed by [the District Court] –
>
> THE COURT: It was not fully addressed. As far as the papers I've seen has one sentence on it and anyway if he discussed it, you know, in a thousand pages we have to make an independent decision. Do you have standing?
>
> MR. STAHL: Well, in the context in which this comes up though the only standing issue that was raised by Cal. City –
>
> THE COURT: The standing is jurisdictional even this prudential standing or at least, you know, we can certainly raise it on our own initiative even if it's not argued by

> the defendant because it is very – and as he points out if we had a real seller here owner we would have a better sense of the factual dimensions of this.
>
> MR. STAHL: I'd like to go to that too. The factual dimensions of this, whether there is an appeal, how long it takes, all of that can and will be fully addressed if it's [inaudible] to what the City's going to argue before we get to a judgment on the merits. Here we are on a preliminary injunction –
>
> THE COURT: You still have to have standing." Transcript Oral Argument, September 7, 2007.

Prior to the Seventh Circuit rendering its decision, the Association filed a Motion for Leave to Inform the Court of Material Developments in the District Court and to File a Supplemental Brief. In the body of the motion, citing legal authority, the Association requested leave to file supplemental briefs on the issue of standing.

The Seventh Circuit ultimately held, without expressing any opinion as to the merits, that it could consider the issue of prudential standing irrespective of the parties' arguments or concessions. Pet. App., 1-28. The court further held that the Association and its members did not have standing to challenge a law that might impede the sale of property they would like to broker. According to the court, the Association and its members did not have a constitutionally protected interest in more or higher commissions and their claims

were simply too remote to satisfy prudential standing concepts. While two of the judges agreed that the Association satisfied Article III standing but lacked prudential standing, the concurring opinion by Judge Sykes concluded that the Association lacked both Article III standing and prudential standing. Pet. App., 15-26.

After the Seventh Circuit issued its opinion, the Association filed petitions for rehearing and for rehearing *en banc*. Both petitions were denied, and the Association filed its Petition in this Court. Pet. App., 36-37.

In October 2007, Ayanna Walker, alleging to be a Calumet City homeowner, filed a complaint for declaratory and injunctive relief against the City challenging the constitutionality of the ordinance. Walker is represented by the Association's attorneys, and she raises similar claims. The Walker litigation is currently pending in the District Court for the Northern District of Illinois. Litigation regarding the constitutionality of the ordinance will continue even assuming the Association's Petition is denied. Additionally, the City has amended the challenged ordinance multiple times since the inception of the present litigation. The fourth version of the ordinance is at issue in the Walker litigation. Prior to the Seventh Circuit rendering its decision here, the Association notified the court of the Walker lawsuit as part of its motion to file supplemental briefs. Pet. App., 31-32.

REASONS FOR DENYING THE PETITION

The Seventh Circuit's decisions in this matter do not conflict with the holdings of this Court or any Court of Appeal. Nor do they implicate a federal question that has not been decided. The Association, therefore, has not met its burden of demonstrating "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10. The City begins by first addressing the argument raised in section II of the Petition, *i.e.*, whether federal courts may address prudential standing *sua sponte*.

I. Prudential standing is a threshold determinant of jurisdiction and courts accordingly may address the matter *sua sponte*.

In its Petition (section II), the Association claims that this Court has never addressed the right of a federal reviewing court to raise, *sua sponte*, the issue of prudential standing. The Association also claims that there is a purported split in the federal circuits on this issue. It seeks a declaration from this Court that reviewing courts may not address prudential standing where (1) the parties have not raised the issue or (2) have conceded it. Such a rule, however, would contradict established jurisdictional principles. Prudential standing is an aspect of the federal court's jurisdiction over legal disputes, and accordingly, courts may raise it at any time. The Association's proposed "waiver" rule ignores decades of jurisprudence, and its petition must therefore be denied.

A. Prudential standing is an aspect of jurisdiction and accordingly courts have a duty to consider a party's standing *sua sponte*.

Like Article III standing, this Court has recognized that prudential standing is a "threshold" matter that all courts must consider in an assessment of their own jurisdiction. Contrary to the Association's assertions, all federal courts are obligated, *sua sponte*, to consider whether claimants possess prudential standing as a threshold matter before proceeding to the merits of a particular issue. This Court stated in *Warth v. Seldin*:

> "The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975).

In other words, it was the Association's responsibility to allege sufficient facts demonstrating that it had standing to invoke the court's jurisdiction and exercise of remedial powers. It was the Seventh Circuit's responsibility to determine whether the Association met that burden. In *Mansfield C. & L.M.R. Co. v. Swan*, this

Court defined its role in assessing its own jurisdiction, stating:

> "[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Swan*, 111 U.S. 379, 382 (1884).

Furthermore, standing, whether Article III or prudential in nature, must be satisfied at all times throughout the litigation. *Arizonans for Official English v. Arizona*, 520 U.S. 43, n. 22 (1997). Accordingly, whether or not the parties raise the issue of standing on appeal, federal courts, as a threshold matter, possess a duty to assess their own jurisdiction *sua sponte*.

The Association proposes to distinguish Article III standing from prudential standing, *i.e.*, making prudential standing comparable to an affirmative

defense that must be raised by a party or waived. However, neither this Court nor any appellate courts have ever so characterized prudential standing. In *Warth*, as quoted above, the Court discussed Article III and prudential considerations collectively in identifying standing as a "threshold determinant of the propriety of judicial intervention." *Warth*, 422 U.S. at 517-18. Contrary to the Association's contention, this Court has consistently recognized the duty of all federal courts to examine standing as an aspect of their own jurisdiction. This judicial duty or power is not affected in any way by the agreements or concessions of the parties. The Seventh Circuit specifically recognized this during oral argument when one of the justices warned counsel for the Association that "the City's concession doesn't bind us so you can forget about that line of argument." Transcript of Oral Argument, September 7, 2007. If parties could affect their standing by agreement or concession, then the jurisdiction of the federal courts, including the Supreme Court, could be subject to the whims of the parties.

The Association relies on *Arizona v. California*, 530 U.S. 392 (2000), and *United States v. Burke*, 504 U.S. 229 (1992), to support its argument that prudential standing should be subject to waiver like any affirmative defense. Neither opinion, however, compared standing principles with affirmative defenses. In fact, the Court did not discuss jurisdictional issues in either case. In *Arizona*, addressing a water rights dispute, the Court held that "issue preclusion" and "res judicata" arguments were affirmative defenses subject to waiver. *Arizona*, 530 U.S. at 412-13.

In *Burke*, the Court held that back pay awards received in the settlement of Title VII claims were not "personal injury damages" for purposes of statutory tax exemptions. *Burke*, 504 U.S. at 242. The Association, in fact, only quotes a concurring opinion from *Burke* in which Justice Scalia cites the well-accepted principle that courts generally should not address issues not raised by the parties. *Burke*, 504 U.S. at 246.

The *Arizona* and *Burke* opinions have no bearing on the issue of prudential standing. Neither opinion addressed standing or analyzed the purported similarities between prudential standing and affirmative defenses. The Association is urging this Court to establish a new principle, *i.e.*, that prudential standing be separated from its jurisdictional foundations and converted to a litigation defense to be raised or waived by litigants. This would contradict years of Supreme Court jurisprudence.

Finally, in footnote 1 of its petition, the Association contends that the Court has sent out "mixed signals" as to whether or not waiver of prudential standing is "permissible," relying on *Craig v. Boren*, 429 U.S. 190, 192-94 (1976). The Association, however, mischaracterizes the *Craig* Court's treatment of prudential standing. The *Craig* Court did not reject as untimely an objection to the appellant's prudential standing. In fact, in *Craig*, neither party raised the issue of standing – constitutional or prudential. Unlike in the present case, the issue was not raised in the lower courts or before the Supreme Court. The opinion suggests that the *Craig* Court raised the issue itself, as it should, as

part of its threshold determination of standing. *Craig*, 429 U.S. at 192-94. Contrary to the Association's assertions, nothing in the *Craig* decision is at odds with the decision in *Bender v. Williamsport Area School District*, 475 U.S. 534, 546 (1986). The *Craig* case supports the decision of the Seventh Circuit here.

B. Even if prudential standing is not jurisdictional in the constitutional sense, allowing courts to raise the issue *sua sponte* is consistent with the federal courts' authority to raise, *sua sponte*, abstention and other matters affecting justiciability.

There is no reason to treat the doctrine of prudential standing differently from other doctrines federal courts may raise *sua sponte*, such as abstention, in considering whether to exercise their jurisdiction. The Seventh Circuit made this analogy in finding that plaintiff lacked prudential standing. Pet. App., 11. Federal courts may abstain from exercising jurisdiction over a particular matter under *Younger v. Harris*, 401 U.S. 37, 53 (1971), and *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 499-501 (1941), even where Article III standing is satisfied and a case or controversy is properly before the court. *Murray v. Carrier*, 477 U.S. 478 (1986) *citing Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). This Court has further held that *Younger* and *Pullman* abstention, which are based on principles of comity and Federalism, may be raised *sua sponte*. *Bellotti v. Baird*, 428 U.S. 132, 143, n. 10 (1976). This Court has stated, "[t]he doctrine of abstention . . . is an extraordinary and narrow exception

to the duty of a District Court to adjudicate a controversy properly before it." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959).

Prudential standing objectives are similarly "founded in concern about the proper-and properly limited-role of the courts in a democratic society." *Warth v Seldin*, 422 U.S. at 498. Accordingly, in *Tenet v. Doe*, Chief Justice Rehnquist noted that the concept of standing serves an objective at least as important as those served by the various doctrines of abstention developed by the Court. *Tenet v. Doe*, 544 U.S. 1, 6, n. 4 (2005). The Seventh Circuit recognized the similarity between the two doctrines in the present case, and correctly held that it was appropriate to address standing even though neither party specifically raised the issue in their appellate briefs. The same reasons that justify the courts raising abstention *sua sponte* also justify the raising of prudential standing even if it is not argued by the parties.

C. There is no split among the federal circuits on the issue of addressing prudential standing *sua sponte*.

The Association further contends that there is a split among the federal circuits regarding whether a reviewing court may raise *sua sponte* the issue of prudential standing. The Association readily admits that the Second, Sixth, and District of Columbia Circuits have held that federal courts may raise prudential standing issues on their own motion, but contends that the Seventh and Ninth Circuits have held otherwise. The Association, however, has misinterpreted the Seventh

Circuit cases upon which it relies and an accurate reading of the cases reveals that there is no split in the circuits on this issue. Significantly, the Seventh Circuit clearly held in this case that federal courts may consider prudential issues on their own motion irrespective of the parties' arguments.

1. The Seventh Circuit's decision in this case is consistent with its prior decisions.

Attempting to manufacture an ambiguity in the Seventh Circuit's position on this issue, the Association relies on *Lindley v. Sullivan*, 889 F.2d 124 (7th Cir. 1989). In *Lindley*, the Secretary of Health and Human Services denied an adopted child "child insurance benefits" under the Social Security Act. *Lindley*, 889 F.2d at 127. The child's father, himself a recipient of social security disability benefits, filed a lawsuit on behalf of his son challenging the Secretary's decision, in part, as a violation of his and his wife's equal protection rights. *Lindley*, 889 F.2d at 127. After the district court upheld the Secretary's denial of benefits, the Secretary, for the first time on appeal, argued that the "third-party standing" doctrine barred the child from essentially asserting his parents' interest in the insurance benefits. The Seventh Circuit Court of Appeals declared, "We are obliged to address [the child's] standing because it is a predicate to our subject matter jurisdiction here." *Lindley*, 889 F.2d at 128. Having first found that the child satisfied Article III standing, the Court then stated, "[b]ecause the Secretary failed to suggest in the district court that prudential considerations should bar [the child] from suing on his parents' behalf, we cannot consider the arguments here," citing *Craig v. Boren*,

429 U.S. at 193-94. *Lindley*, 889 F.2d at 129. The Association's reliance on *Lindley* focuses entirely on this single sentence.

In the present case, however, the Seventh Circuit specifically addressed *Lindley* and clarified that it did not intend to absolutely bar judicial consideration of prudential standing where the parties had not raised the issue.[1] The Seventh Circuit explained that it only meant that a party's failure to raise standing might serve as a ground for courts to decline to consider prudential considerations. The Seventh Circuit's holding is consistent with the Supreme Court's opinion in *Craig v. Boren*, 429 U.S. at 193-94, which also held that the failure to invoke the doctrine of prudential standing is merely a ground for courts to refuse to consider the doctrine and not an absolute bar to its consideration. As noted by Judge Posner in this case, the *Lindley* court, in fact, proceeded to address whether prudential standing considerations were satisfied in spite of the statement that the issue was waived. Pet. App., 13.

The Association also relies on two other Seventh Circuit opinions that cite *Lindley* for the proposition that prudential standing cannot be considered if not raised by a party. *See MacLauchlan v. Prudential Insurance Co. of America*, 970 F.2d 357, 359 (7th Cir. 1992); and *United Transportation Board v. Surface Transportation Board*, 183 F.3d 606, 610-11 (7th Cir. 1999). In *United Transportation*, as in *Lindley*, the

1. As discussed in the Counter Statement of the Case and below, the record establishes that the City did challenge the Association's standing in the district court.

Seventh Circuit first stated that the defendant waived the issue of standing but then proceeded to immediately consider whether the requirements of prudential standing were satisfied. *United Transportation*, 183 F.3d at 611. Addressing this aspect of its opinion in *United Transportation*, the Seventh Circuit in the present case again clarified that it was merely holding that prudential considerations could be "waived" and not that a failure to raise the issue was an absolute bar to its consideration. Pet. App., 14. As noted above, the *United Transportation* court, in fact, proceeded to reach the issue in spite of the stated "waiver." *United Transportation*, 183 F.3d at 611.

Similarly, the Seventh Circuit has directly undermined the Association's reliance on *MacLauchlin*. In a footnote, the *MacLauchlin* court stated, "We may not raise prudential standing *sua sponte*." *MacLauchlin*, 970 F.2d at 359, n.1. Once again, in the present case, Judge Posner and the Seventh Circuit specifically addressed the Association's reliance on this statement. The Court identified this language as "dictum" as opposed to a "holding." According to the Seventh Circuit, the *MacLauchlin* case was unusual in the sense that the district court rejected the suit on its merits without first assessing whether the plaintiff possessed a right to sue in the first place. Pet. App., 14. Because the Seventh Circuit agreed that the underlying case and appeal were meritless, a detailed analysis of prudential standing issues would have only delayed the obvious need to dismiss the case on its merits.

Accordingly, the Seventh Circuit has specifically disagreed with the Association's interpretation of

Seventh Circuit precedent. The decision in this case is the most recent and most extensive explanation of the Seventh Circuit's position on prudential standing and waiver. Here the Seventh Circuit has definitively declared that prudential standing may be raised *sua sponte*.

2. The Seventh Circuit's position is consistent with the holdings of other federal circuits.

The Seventh Circuit specifically noted that its holding was consistent with several other federal circuits, *citing Delorme v. United States*, 354 F.3d 810, 815 (8th Cir. 2004); *American Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1357-58 (D.C. Cir. 2000); *Community First Bank v. National Credit Union Administration*, 41 F.3d 1050, 1053 (D.C. Cir. 1994) (prudential standing is a "qualifying hurdle that plaintiffs must satisfy even if raised *sua sponte* by the court"); *Thompson v. County of Franklin*, 15 F.3d 245-247-49 (2d Cir. 1994) ("[t]he concept of standing-even its prudential dimension-is a limitation on federal court jurisdiction").

Still other opinions, not cited by the Seventh Circuit, are also in agreement with its holding in this case. *Davis v. Blackburn*, 803 F.2d 1371 (5th Cir. 1986) (holding that while prudential standing is not jurisdictional, it is as important as Article III standing and may be raised by courts *sua sponte*), *citing Tileston v. Ullman*, 318 U.S. 44 (1943); *Legal Defense Fund v. Espy*, 23 F.3d 496-99 (D.C. Cir. 1994); *Steffan v. Perry*, 41 F.3d 677, 697, n. 20 (D.C. Cir. 1994) (*en banc*). The Association does not

contest that the opinions of these circuits supports the decision here.

Contrary to the Association's contentions, the decisions of Ninth Circuit do not establish a rule of absolute waiver with respect to prudential standing. The Association primarily relies on *Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co.*, 219 F.3d 895 (9th Cir. 2000). The Association incorrectly relies on this opinion to suggest that, in the Ninth Circuit, a failure to raise prudential standing constitutes an absolute waiver of its consideration. In fact, the ruling in *Pershing Park* comports completely with the Seventh Circuit's prior opinions – that a party's failure to raise the issue of prudential standing *may* constitute a waiver; whether the issue is waived is within the court's discretion.

In *Pershing Park*, a party raised the issue of prudential standing at a motion in limine conference on the eve of trial - after significant discovery had been completed. *Pershing Park*, 219 F.3d at 898-99. The district court viewed this effort as strategic and ruled that the issue had been waived. *Pershing Park*, 219 F.3d at 900. On appeal to the Ninth Circuit, the court – similar to the Seventh Circuit – held that whether or not the issue of prudential standing can be waived is a matter within the court's sound discretion. The *Pershing Park* court stated, "The district court did not abuse its discretion in determining that [the defendant] waived any objections to the developers' third-party standing

to assert those claims." *Pershing Park*, 219 F.3d at 901. The court also noted, in a footnote, that

> "[o]ur conclusion that debtor standing is ordinarily prudential comports with our decision in *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 708, n. 1 (9th Cir. 1986), where we treated the decision to hear an untimely objection to a debtor's standing as implicating our discretion to hear purely legal issues not properly raised below, and not our jurisdiction to hear the case." *Pershing Park*, 219 F.3d at 901, n. 3.

The Ninth Circuit issued a similar opinion in *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1995). In that case, various Indian tribes sought declaratory and injunctive relief against district attorneys who were prosecuting employees of Indian casinos. *Roache*, 54 F.3d at 537. The district court declared that federal statutes precluded county prosecutors from exercising any jurisdiction to prosecute tribal gaming officials under state law. *Roache*, 54 F.3d at 537. On appeal, the government, for the first time, challenged the standing of the Indian tribes to seek injunctive relief on behalf of the third-party individuals being prosecuted. *Roache*, 54 F.3d at 538. The Ninth Circuit found that the government had waived its standing argument, stating:

> "The State candidly admits, however, that this argument was not raised in the district court. The argument is therefore waived and we will

> not entertain it unless the defect in standing deprives us of jurisdiction for lack of a case or controversy." *Roache*, 54 F.3d at 538, *citing Barrows v. Jackson*, 346 U.S. 249 (1953).

As in *Lindley*, while the Ninth Circuit declared that the standing argument was waived, it did not hold that it was absolutely barred from considering issues of prudential standing. At most, the opinion reflects that the court chose not to address the issue. Neither prudential nor Article III standing are specifically mentioned by the court, and its analysis of the "waiver" was brief. Lastly, unlike the present case, the government did not raise standing as an issue in the lower court. Here the City did raise standing, and the district court addressed it. Pet. App., 33.

Both *Pershing Park* and *Roache* demonstrate that, at most, the issue of prudential standing may be waived. Neither opinion, however, suggests that the courts are absolutely barred from considering prudential considerations. Thus, contrary to the Association's assertion that this issue is a matter of confusion among the circuits, it is clear that all of the federal courts having considered the issue agree that courts may raise prudential standing considerations *sua sponte* in assessing their own jurisdiction. Even if none of the parties have raised prudential standing, the courts still possess discretion to address the issue.

D. The Association's contention that the district courts are better equipped than courts of appeal to address standing issues is not supported by legal authority.

The Association further contends that treating prudential standing as waivable on appeal is supported by the fact that prudential standing is a "fact-intensive" analysis that district courts are best positioned to decide. While the Association admits that Article III constitutional standing is a necessary element of the federal court's subject matter jurisdiction, it characterizes prudential standing as merely a "rule of practice." The Association is simply seeking a new rule of prudential standing carefully tailored to allow it to proceed in this case. Attempting to argue from the point-of-view of the City, the Association theorizes that responding parties might prefer to defend a challenge from an association as opposed to one brought by individual members or third-parties and that courts should respect that position. The Association believes that reviewing courts might be guilty of judicial activism when addressing prudential standing where the parties have not raised it on appeal.

The Association offers no legal support for these contentions. As stated above, standing must be satisfied at all levels of the litigation. Additionally, it is a plaintiff's burden to establish that he or she has standing to sue. *Warth v. Seldin*, 422 U.S. at 517-18. Under the Association's proposed concept of prudential standing, the parties would, by agreement or concession, dictate the court's continued jurisdiction over particular cases and thereby defeat the principles set forth in *Warth*. As

long as the defendant did not raise the issue on appeal, reviewing courts thereafter would not be able to address this aspect of their jurisdiction even in the cases where jurisdiction obviously does not exist. This result is inconsistent with the concept of prudential standing as a judicially-imposed, threshold matter meant to protect the resources of the courts and ensure the presentation of well-defined issues.

The Association offers no support for its claim that analyzing prudential standing necessarily requires "fact-intensive" analysis better suited for the district courts. There is no reason that reviewing courts should not be able to address the existence of prudential standing where, as here, it is clear from the record that the plaintiff does not have standing. There is no reason for allowing reviewing courts to continue to address Article III standing *sua sponte* but not prudential standing. Both are "threshold determinants" affecting the courts' jurisdiction. The Association's proposed rule is merely an attempt to mold the rules on prudential standing in such a way as to let it move forward.

As discussed further in section III, the Association does not identify what facts it was prevented from introducing to satisfy prudential, third-party standing here. It only claims that procedurally it was improper to take a second look at the issue. As a matter of jurisdiction, the Seventh Circuit had every right and obligation to review the issue *sua sponte*. In spite of its claims that it is the ideal advocate here, it is undisputed that the Association's challenge to the ordinance is entirely based on the interests of third-parties.

II. Having established that the court properly addressed prudential standing *sua sponte*, the Association did not then possess a due process right to file a supplemental brief on the issue.

The Association did not possess a due process right to submit a supplemental appellate brief on the issue of prudential standing. Accordingly, the Seventh Circuit's decision to deny supplemental briefing does not support Supreme Court review of this case. The Association has cited no authority suggesting that it possessed this purported due process right to "notice" and an "opportunity to present its position" on prudential standing prior to the Seventh Circuit's ruling. This was a matter of pure judicial discretion. Furthermore, even if such a right existed or the Seventh Circuit could be found to have abused its discretion, the record demonstrates that the Association was able to present its written position on standing prior to the court rendering a decision on the issue. Additional briefing on the matter would not have further enlightened the court.

A. The Association's claimed due process right to submit a brief is not supported by legal authority.

The cases relied upon by the Association are clearly distinguishable from the facts and issues presented in this case. Neither decision was based on standing or jurisdictional issues. In *Day v. McDonough*, 547 U.S. 198, 209-10 (2006), the Court held that, while a federal district court had the authority to consider, *sua sponte*, whether a state prisoner's habeas corpus petition was

filed on time, the district court was obligated to first notify the parties and to allow them to present their positions on the timeliness issue before considering dismissal on that ground. In *Burns v. The United States*, 501 U.S. 129, 138-39 (1991), the Court held that a district court could not *sua sponte* depart from the ranges imposed by statutory Sentencing Guidelines without first giving notice to the parties and allowing them the opportunity to present their positions.

Neither decision bears on the issue presented here, and the holdings were limited to the statutes and procedures presented in the respective cases. Both *Day* and *Burns* involved matters of criminal procedure, and neither of them addressed the issues of standing or jurisdiction. In fact, the Court in *Day* specifically recognized that the statute of limitations issue there did not involve a question of jurisdiction-leaving it, under the circumstances of that case, to the discretion of the district court whether to raise the matter *sua sponte*. *Day*, 547 U.S. at 205. According to the Court, once the district court raised the affirmative matter of timeliness, the *pro se* prisoner should have been given an opportunity to address the issue prior to dismissal. In *Burns*, the Court based its holding there on a matter of statutory interpretation rather than on any constitutional analysis of standing and jurisdictional matters. In fact, the Court specifically found that the "notice" and "opportunity to be heard" required in that case were mandated by rule. There was no discussion of due process concepts. The Court stated:

> "In this case, were we to read Rule 32 to dispense with notice, we would then have to

> confront the serious question whether notice in this setting is mandated by the Due Process Clause. Because Rule 32 does not clearly state that a district court *sua sponte* may depart upward from an applicable Guidelines sentencing range without providing notice to the defendant we decline to impute such an intention to Congress." *Burns*, 501 U.S. at 138.

The cases have no bearing on the Seventh Circuit's ability to raise *sua sponte* the issue of prudential standing in a civil lawsuit.

The Association can claim no surprise that the Seventh Circuit addressed the issue of standing-both Article III and prudential. Standing is an issue which the courts may address at any time. Additionally, the issue of standing was addressed by the district court. Pet. App., 33. The Association cannot point to any legal authority recognizing a due process right to supplement its appellate argument where the court raises standing on its own. It was within the court's discretion to refuse supplemental briefing on standing or any other issue.

B. The Association did have opportunities to present its position on whether it satisfied prudential standing and further briefing was unnecessary.

Lastly, even assuming the Association was entitled to file a supplemental brief or that it was an abuse of discretion to technically deny the request, the record demonstrates that the Association was able to present its position on prudential standing both before and after

the Seventh Circuit rendered its decision. On September 18, 2007, only 11 days after oral argument, and approximately 1 month prior to the Seventh Circuit's decision, the Association filed a Motion for Leave to Inform the Court of Material Developments in the District Court and to File a Supplemental Brief. Pet. App., 31. The Association attached several exhibits to the four-page motion, including the printed transcript of the oral argument on September 7. The Association's motion raised substantially the same arguments now raised in its petition for writ of *certiorari*, including the following: the City did not challenge the Association's standing on appeal and the Association therefore did not brief the issue; the Association had direct standing under *Havens Realty v. Coleman*, 455 U.S. 363 (1982); and the Association also had standing under *Singleton v. Wulff*, 428 U.S. 109 (1976). The Association sought remand to the district court to develop the factual record related to standing and/or to enter a briefing schedule allowing the parties to submit briefs addressing standing and jurisdictional issues.

Additionally, after the court rendered its decision, the Association filed a petition for rehearing and a petition for rehearing *en banc*. Pet. App., 36-37. These petitions provided the Association with additional opportunities to substantively address the issue of prudential standing. The Association, however, was not satisfied with multiple bites at the apple.

Although the Seventh Circuit ultimately did not grant the relief requested by the Association, the Association was able to present its arguments to the court through these procedures and clearly the court

did not disregard them. In his opinion, Judge Posner, directly addressed many of the Association's arguments. For example, Judge Posner carefully addressed the Association's reliance on *Lindley*, declaring that the opinion did not support the Association's absolute waiver position with respect to prudential standing. Pet. App., 13. The record indicates that additional briefing would not have further informed the court of its rights and powers with respect to prudential standing issues.

III. The Seventh Circuit correctly held that the Association did not have associational or third-party standing to bring this action on behalf of City homeowners.

The Association and its members are simply too remote to possess standing to challenge the City's ordinance. The Association contends the Seventh Circuit erred in holding that the Association lacked "associational and prudential standing" to litigate issues bearing on the constitutional rights of its "homeowner clients." According to the Association, it has satisfied the requirements for standing set forth in both *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), and *Singleton v. Wulff*, 428 U.S. 106 (1976). It claims that its "relationship" with Calumet City homeowners is sufficiently "close" to make it an effective advocate of the homeowners' due process rights and satisfy any prudential considerations. Additionally, the Association believes that the homeowners' lack of financial means and incentives is a genuine obstacle to their bringing this suit on their own behalf and further supports the Association's right to

bring this action. The Association asserts it has "superior knowledge," resources, and expertise compared to the homeowners and that "[i]ndividual homeowners, * * * cannot or do not want to be constitutional heroes challenging [the] City's Ordinance." Pet., 30.

These arguments are not proper grounds for granting the Petition. The Association is simply raising purported errors in the Seventh Circuit's factual findings or application of the law. According to Supreme Court Rule 10, such grounds are rarely the proper basis for granting a petition for writ of *certiorari*. Alternatively, the record demonstrates that the Seventh Circuit did not err in finding that the Association did not have standing and reversing the preliminary injunction. In spite of Association's broad assertions, it has not satisfied its burden of demonstrating that it has standing to challenge the City's ordinance on the constitutional grounds raised. While admitting that the homeowners may simply not want to sue the City, the Association demands the opportunity to be "constitutional heroes" on their behalf. The Association equates possession of financial resources and desire with standing. *Hunt* and *Singleton* demand much more than the ability and willingness to pay for a lawsuit. The Association's purported "relationship" with the homeowners does not meet the "closeness" requirement established by this Court, and the Association's self-proclaimed superior knowledge, resources, and expertise do not create an obstacle hindering the homeowners from bringing their own suit. There is simply no basis to overturn the Seventh Circuit's decision that the Association did not have standing to bring this litigation.

In essence, the Association argues that it, or its members, have third-party standing to bring this lawsuit on behalf of Calumet City homeowners. There is no claim that any homeowners are actually members of the Association. As recognized by the Seventh Circuit, even assuming that the Association satisfies Article III standing, it cannot satisfy the prudential considerations of third-party standing. Generally, the question of standing is directed to whether a litigant is entitled to have the court decide the merits of a dispute. *Warth*, 422 U.S. at 498. The court must assess both constitutional limitations on its jurisdiction and prudential limitations on its exercise. *Warth*, 422 U.S. at 498.

As to the constitutional dimension of standing, a plaintiff must raise an actual "case or controversy" between the parties within the meaning of Article III. *Warth*, 422 U.S. at 498. In other words, the court determines whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" to justify his or her invocation of federal-court jurisdiction and the court's exercise of its remedial power on his behalf. *Warth*, 422 U.S. at 498-99. Accordingly, the court should only invoke its jurisdiction when the plaintiff himself has suffered a threatened or actual injury from alleged illegal action. *Warth*, 422 U.S. at 499.

In addition to Article III's constitutional requirements, prudential rules of standing serve to further limit the role of the courts in resolving public disputes. *Warth*, 422 U.S. at 500. Under this analysis, the courts must generally determine whether the constitutional or statutory provision on which the

underlying claim rests is intended to grant relief to persons in the plaintiff's position. *Warth*, 500. First, claims based on alleged harm that are basically a "generalized grievance" shared in substantially equal measure by a large class of, or all, citizens does not warrant exercise of the courts' jurisdiction. *Warth*, 422 U.S. at 499. Secondly, even if a proper case and controversy is raised, a plaintiff is generally required to assert is own legal rights and interests and cannot rely on the legal rights or interests of third parties. *Warth*, 422 U.S. at 499. In applying these principles, the courts avoid attempts to decide abstract questions of general public significance. *Warth*, 422 U.S. at 500. These prudential considerations are also important because courts should not adjudicate rights unnecessarily and it is possible that holders of those rights who are not before the court do not wish to assert them. Additionally, third parties usually will be the best proponents of their own legal rights. *Singleton*, 428 U.S. at 113-14.

To establish third-party standing, the relationship between the proposed litigant and the third party whose rights he or she seeks to advance must be sufficiently close to permit the litigant to proceed. *Singleton*, 428 U.S. at 115. In assessing whether third-party standing exists, a court may consider the third party's ability to assert his or her own rights-even where the relationship between the parties is close. *Singleton*, 428 U.S. at 115-16.

In *Singleton*, the Court determined that physicians who perform abortions for their patients could appropriately raise their patients' interests in

challenging state statutes that severely restricted the types of abortions eligible for medicaid coverage. *Singleton*, 428 U.S. at 108-10. According to the Court, the statutes affected the patients' constitutionally protected right to decide to have an abortion. The patients' needs to consult and pay physicians to exercise this right made the physicians "uniquely qualified" to litigate the state's potential interference in the decision. *Singleton*, 428 U.S. at 117. Furthermore, the Court recognized that the patients faced several obstacles to bringing their own claims, including privacy concerns and the potential mootness of each individual claim due to the relatively short-lived nature of the right to obtain an abortion. *Singleton*, 428 U.S. at 117-18.

In the present case, the Association and its members cannot demonstrate the existence of a relationship with City homeowners that would satisfy the *Singleton* factors. First, there was no indication in the record that any Association members entered into a contractual relationship with City homeowners. At most the Association could only speculate that its members might be retained as brokers by future home sellers in the City. Secondly, the relationship between a homeowner and a realtor, even assuming the existence of a contract, is not the type of intimate relationship comparable to that between a patient and doctor. A patient and doctor have a private, confidential, and personal relationship that is integral to a patient's well-being. The homeowner and realtor have a limited business arrangement. Although the Association has declared that it possesses more knowledge and resources than the homeowners, there is nothing in the possible business arrangement between the two sides that would suggest that realtors

are "uniquely qualified" to litigate matters affecting persons' property interests. While realtors might generally possess more sophisticated knowledge about real estate transactions, no amount of experience or education can substitute for the personal or subjective knowledge of the homeowner.

Additionally, the only real "burden" the Association contends inhibits the homeowners from raising their own rights is money. This argument is not supported by the record and is factually presumptuous and arrogant. Such a burden is insufficient to ignore or relax the rules of prudential standing. The homeowners have options available to them for bringing such a claim regardless of their individual financial conditions. If financial hardship was a primary factor in standing considerations, then realtors, or conceivably anyone with resources ready to step in, could be found to have standing to pursue the property rights of potential clients in poor communities but not in middle-class or affluent communities. The issue of prudential standing would depend almost entirely on the individual's ability to pay and not on the relationship with the class of affected persons. This would lead to inconsistent and unworkable results.

The Association further claims that its own members' potential loss of commissions due to a decrease in home sales in the City is an injury sufficient to satisfy prudential standing concerns. As recognized by the Seventh Circuit, the Association's members do not have a constitutional right to more or greater commissions. They are relying entirely on the property rights of homeowners, and with the vast majority of the

homeowners they have no relationship, contractual or otherwise. Their purported injury is therefore speculative and remote. Judge Posner correctly noted that if the realtors' claimed decrease in commissions or business was enough to satisfy standing, then taken to its logical conclusion, such a result would permit challenges to the ordinance by countless others whose livelihood depends on the local housing industry, *e.g.*, title insurance companies, mortgage lenders, termite inspectors, moving companies, interior decorators, sellers of "for sale" signs, home buyers, *etc.* Nothing in the record suggests that the Association or its members have been injured such that they satisfy either Article III or prudential standing. The Seventh Circuit correctly held that the Association and its members do not satisfy either associational or third-party standing. Pet. App., 6.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. The City, therefore, respectfully requests that the Petition be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

MAINSTREET ORGANIZATION OF REALTORS®,
successor by name change to REALTOR® ASSOCIATION
OF WEST/SOUTH SUBURBAN CHICAGOLAND,

Petitioner,

v.

CALUMET CITY, ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Court should grant review in this case because: (1) the Seventh Circuit violated Association's[1] due process rights and ignored *Day v. McDonough*, 547 U.S. 198, 210 (2006), because it did not permit Association to brief whether Association had prudential standing, which the Seventh Circuit raised *sua sponte* after City conceded it on appeal, prior to decision, (2) the Court should resolve the split between the Circuits regarding whether a Court of Appeals can consider prudential standing *sua sponte* if the district court has considered the issue and the appellant has conceded it on appeal, and (3) the Court has not yet decided the important issue of whether an association of real estate brokers, who enter into exclusive right to sell contracts with their clients, has associational and prudential standing to challenge the constitutionality of a municipal ordinance that unreasonably restricts property owners' rights to sell property.

City's Opposition fails to present any reasons why the Court should not decide these important issues. Instead, City attempts to confuse the issues, mischaracterizes Association's positions, misstates the law, and fails to inform the Court of material developments since Association filed its Petition. Below we address City's arguments in the order that we addressed the issues in the Petition.

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[1] We use the same defined terms and citation format as used in our Petition.

ARGUMENT

I. The Seventh Circuit Violated Association's Due Process Rights By Adversely Deciding Prudential Standing *Sua Sponte* Without Giving Association The Right To File A Brief On The Issue.

Day unequivocally held that "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Day*, 547 U.S. at 210; *see also Burns v. United States*, 501 U.S. 129, 137-38 (1991) (accord). The due process right protected in *Day* is critical to our adversarial legal system. Courts should decide issues presented by litigants; they should not decide issues without input from the parties. Even if the Court raises an issue *sua sponte*, to comply with due process, it must give the parties an opportunity to be heard on that issue. The Seventh Circuit plainly did not accord Association the right to be heard on prudential standing. Indeed, the Seventh Circuit explicitly rejected Association's request to be heard when it denied Association's motion to file a supplemental brief.

Each of the three points City raises in response to Association's argument is without merit. First, City argues that the right to be heard discussed in *Day* and *Burns* does not apply here because those cases did not involve prudential standing. Opposition, 22-23. City misses the point. The right to be heard is guaranteed by the due process clause and applies to any issue that affects life, liberty or property. Said differently, litigants have an equal right to be heard

regardless of whether the legal issue is the application of the statute of limitations (*Day*), modification of sentencing guidelines (*Burns*) or whether a party has prudential standing (this case).

Second, City argues that Association had "no due process right to submit a supplemental appellate brief" because Association knew that the Seventh Circuit could raise standing "at any time" and thus presumably should have briefed prudential standing in its main appeal briefs. Opposition, 22, 24. Surely that cannot be the rule. Association prevailed in the district court. City conceded prudential standing in its appeal brief and the Seventh Circuit had twice ruled that it could not raise prudential standing *sua sponte*. *McLauchlan v. Prudential Ins. Co. of America*, 970 F.2d 357, 359 n.1 (7th Cir. 1992) (where appellant concedes prudential standing on appeal, the appellate court "may not raise prudential standing issues *sua sponte*"); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 611 (7th Cir. 1999). Accordingly, there was no possible need for Association to address prudential standing in its main briefs.

Finally, City argues that Association had a chance to be heard because, after argument and prior to decision, Association filed a motion seeking leave to file a brief on standing which outlined issues it wanted to argue. City makes the astonishing argument that "Association was able to present its arguments to the court . . . and clearly the court did not disregard them." Opposition, 25-26. City fails to

explain that a single judge – not the Panel – *denied* Association's motion for leave to file a brief on standing *after* the Court had decided the issue adversely to Association. App. 31-32. Similarly, City argues that Association had the right to present its arguments in its Petition for Rehearing. Opposition, 24-26. But due process requires that parties be given the opportunity to be heard *before* a Court decides an issue. As the Court has ruled, the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Petitions for Rehearing are almost never granted and the Seventh Circuit denied Association's petition here. Surely, due process requires more than the opportunity to file an almost always futile brief after a Court of Appeals has already ruled.

II. The Court Should Resolve The Conflict Amongst The Circuits Regarding Whether A Court Of Appeals Can Consider Prudential Standing *Sua Sponte*.

There is undisputedly a conflict among the Circuits regarding whether a Court of Appeals can consider prudential standing *sua sponte*. The Court should resolve this conflict and hold that, if a district court has considered prudential standing and an appellant concedes the issue on appeal, the Court of Appeals may not consider the issue *sua sponte*. City responds to Association's argument by claiming that this Court has already decided the issue, that there is

"not really" a conflict, and that the rule proposed by Association would permit parties to collude to create standing. City's arguments lack merit.

The cases cited by City, *Warth v. Seldin*, 422 U.S. 490 (1975), and *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379 (1884), confirm that the Court has never decided whether a Court of Appeals can raise prudential standing *sua sponte* if the district court has decided the issue and the appellant concedes it on appeal. *Warth* holds that standing is a threshold issue that a court must decide at the outset of litigation. *Mansfield* addresses whether a Court must consider Article III standing – specifically whether a case was properly removed from state court on diversity grounds when the litigants were citizens of the same state at the time the case was filed – on its own, even if not raised by a party. Neither *Warth* nor *Mansfield* says anything about whether a Court of Appeals can raise prudential standing *sua sponte* if the appellant concedes the issue after the District Court decides it.

City's argument that there is "not really" a conflict amongst the Circuits is easily disposed of. Indeed, since Association filed its Petition, the conflict amongst the Circuits (and the accompanying confusion) has become more stark. There are now three separate rules followed by various Circuits regarding whether a Court of Appeals must, may not, or may, consider prudential standing *sua sponte*.

As confirmed by City, at least the Second, Sixth, and D.C. Circuits have held that a Court of Appeals

must consider prudential standing *sua sponte*. *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994); *Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994).

Contrary to City's position, the Ninth Circuit has plainly held that prudential standing can be waived and that the Court of Appeals *may not* consider the issue *sua sponte* if it has been waived. *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000). City's tortured analysis of *Pershing Park* – that the Ninth Circuit only held that "a party's failure to raise the issue of prudential standing *may* constitute a waiver" (Opposition, 17) – must be rejected. The Ninth Circuit plainly held: "[b]ecause issues of constitutional standing are jurisdictional, they must be addressed whenever raised. By contrast, a party waives objections to nonconstitutional [prudential] standing not properly raised before the district court." *Id.* at 899 (citations omitted).

Finally, since Association filed its Petition, the Seventh Circuit in *Rawoof v. Texor Petroleum Co.*, 2008 U.S. App. LEXIS 7359 (7th Cir. 2008), has adopted yet a third rule, namely that a Court of Appeals "*may raise* an unpreserved prudential-standing question on its own, but unlike questions of constitutional standing, *it is not obliged to do so.*" *Id.*,

2008 U.S. App. LEXIS 7359, at *13 (citing the Seventh Circuit's opinion in this case) (emphasis added).[2]

Finally, City mischaracterizes the rule advocated by Association. City posits that, if courts cannot consider prudential standing *sua sponte*, parties could collude to create standing. City's fears are misguided. Association's position is that where a district court has considered prudential standing and the defendant concedes the issue on appeal, the Court of Appeals ought not be permitted to raise the issue *sua sponte*. Association concedes that a district court can always raise prudential standing *sua sponte*. Indeed, that is exactly what happened in this case. After multiple briefs and arguments requested by the district court, the district court carefully considered the facts and circumstances associated with Association's Members' rights and claims and decided the "threshold" standing issue in Association's favor. City decided to not appeal that determination. Association submits that, under such facts, a Court of Appeals ought not be permitted to raise the issue on its own (and certainly should not decide it without (1) any factual record, and (2) giving the parties the opportunity to present facts and argument bearing on the issue).

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[2] Contrary to City's argument, Association does not argue that the Seventh Circuit's position is unclear on this issue. Rather, our point is that the Seventh Circuit reversed itself on the issue during Association's case. The Seventh Circuit's flip flop is further proof that the Circuits need guidance from the Court.

III. The Court Should Resolve The Open Issue Of Whether An Association Of Real Estate Brokers Has Associational And Prudential Standing To Challenge The Constitutionality Of A Municipal Ordinance That Unreasonably Restricts The Right To Freely Sell Private Property.

City offers no reason why the Court should not decide the important issue of whether an association of real estate brokers should be permitted to prosecute this case. The Seventh Circuit plainly reached the wrong answer to that question (not surprisingly, because it refused to permit Association to present the facts and settled law that establish prudential and associational standing). The Court should correct the Seventh Circuit's mistake before it is used by courts to further erode well-established principles of prudential and associational standing.

City argues that Association cannot satisfy the "close relationship" and "existence of obstacles" requirements of *Singleton v. Wulff*, 428 U.S. 106 (1976), to establish prudential standing. City's points are both meritless.

A. Close Relationship Between Brokers And Their Clients.

City states that there is no close relationship between real estate brokers and their clients because "there is no indication in the record that any Association member entered into a contractual relationship

with City homeowners." Opposition, 30. That statement is false. Association's Verified Complaint plainly alleges that Association's Members enter into exclusive right to sell agreements with their clients. Nothing could establish a closer relationship between a homeowner and agent regarding the transfer of property than an exclusive contractual relationship.

City also argues that the relationship between a homeowner and a realtor "is not the type of intimate relationship comparable to that between a patient and doctor. A patient and doctor have a private, confidential, and personal relationship that is integral to a patient's well-being. The homeowner and realtor have a limited business arrangement." Opposition, 30. City, however, ignores other cited authorities in which the Court identified "close relationships" that satisfy *Singleton*. Surely City would not claim that the beer vendor and consumer in *Craig v. Boren*, 429 U.S. 190, 192-94 (1976), had an "intimate" or "private, confidential and personal" relationship that is "integral to a [person's] well-being." Similarly, the lawyer-client relationship in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), is a "limited business arrangement" akin to that between homeowners and real estate brokers. The common features of all relationships in which the Court has found the requisite close relationship are that the activities of the two parties are "inextricably bound" together and that one party hires another to perform a task he is licensed to do. Real estate brokers are fiduciaries to their clients and licensed by the state.

Their relationship with their clients thus falls within the type of relationship that satisfies *Singleton*. Homeowners who want to sell their property enter into contracts with their licensed brokers that grant the brokers the exclusive right to sell the property. In effect, the broker is assigned a percentage of the sale proceeds. Nothing could be more "inextricably bound" together than that.

B. Existence Of Obstacles.

In support of its argument that there are no obstacles to homeowners challenging the constitutionality of the Ordinance on their own, City cites the pendency of the action filed by Ayanna Walker after the Seventh Circuit's decision in this case. What City fails to disclose is that the *Walker* case vividly demonstrates the immense obstacles a homeowner faces if she tries to sue on her own (either individually or on behalf of a class, as suggested by the Seventh Circuit). The *Walker* case also proves correct the Court's recognition that associational suits have substantial advantages over class actions. *See International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Brock*, 477 U.S. 274, 289-90 (1986).

The *Walker* case, filed October 31, 2007, sought the same relief that the Association sought in its case. Since the *Walker* complaint was filed, City has manipulated the proceedings to delay consideration of Walker's motions for a preliminary injunction and

class certification. City raised every conceivable obstacle to prevent Walker from prosecuting her case, all at considerable expense. As the district court was finally preparing to rule on class certification and turn to Walker's request for a preliminary injunction, City unilaterally volunteered to not enforce the Ordinance against Walker as a way to moot her claim and render her inadequate as a class representative. The Ordinance remains in effect as to all other property owners trying to sell their homes. On May 6, 2008, more than six months after the case was filed and without any substantive issues being decided, City persuaded the district court to dismiss Walker's claim on mootness grounds. Of course, if another property owner decides to take on the considerable burden of suing City so that they can sell their home without unreasonable governmental interference, nothing can stop City from again deciding to selectively not enforce the Ordinance against that property owner too, thereby forever foreclosing judicial examination of the constitutionality of the Ordinance. Alternatively, in more favorable markets, a residence is likely to sell in much less time than the six months the *Walker* action was pending. As the events in the *Walker* litigation prove, there are considerable, and indeed, perhaps insurmountable obstacles to individual homeowners suing City to challenge the Ordinance.

In contrast, by allowing Association to prosecute this case, the Court would ensure prompt and efficient resolution of important constitutional issues

that affect every property owner and real estate broker in City. The events of Association's case leading to the Seventh Circuit's decision prove this point. Association filed its facial challenge to the constitutionality of the Ordinance on April 24, 2006. By December 8, 2006, Association had obtained two preliminary injunctions against enforcement of the Ordinance (due to City's amendments to the Ordinance). Accordingly, in less than eight months with Association as the plaintiff, the litigants were able to address the constitutionality of the Ordinance and obtain an appealable order.

City also argues incorrectly that "the only real 'burden' the Association contends inhibits the homeowners from raising their own rights is money. . . . Such a burden is insufficient to ignore or relax the rules of prudential standing." Opposition, 31. City is wrong on both counts. First, the obstacles facing homeowners need not be "insurmountable." *Singleton*, 428 U.S. at 117. There must only be some hindrance to the third party's ability to protect his or her own interests. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Courts have recognized that financial burdens of pursuing litigation can satisfy *Singleton*. *Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 363 F. Supp. 2d 47, 53 (D.P.R. 2005), *aff'd*, 443 F.3d 103 (1st Cir. 2006).

Second, City completely ignores Association's other argument that individual homeowners face the obstacle of a homeowner's claim becoming moot because a sale is closed, the seller decides to simply comply with City's repair order because those costs

are a fraction of litigation costs, or, as is the case with Walker, the City unilaterally decides not to enforce the Ordinance in an effort to "pick-off" homeowner plaintiffs' ability to challenge the Ordinance.

Because the Seventh Circuit plainly erred in denying Association standing and, in doing so, misapplied the Court's long-standing precedent on prudential and associational standing, the Court should grant review to prevent further erosion of well settled law. If the Seventh Circuit's opinion is allowed to stand, important constitutional rights will continue to be violated and access to courts to protect constitutional rights will be severely restricted.

CONCLUSION

Association requests that the Court grant Association's Petition. Because Association was denied due process, at a minimum, the Court should grant the Petition, vacate the Seventh Circuit's judgment and opinion and remand the case for further proceedings that comply with due process.

Dated: May 9, 2008

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